No. 12880

United States
Court of Appeals
For the Ninth Circuit.

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

GUY F. ATKINSON CO., and J. A. JONES CONSTRUCTION CO.,
Respondent.

Transcript of Record

Petition for Enforcement of an Order of the National Labor Relations Board

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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APPEARANCES

PATRICK H. WALKER,

Seattle, Wash.

For the General Counsel of the National Labor Relations Board.

WILLIAM C. ROBBINS,

Richland, Wash.

For Guy F. Atkinson Co. and J. A. Jones Construction Co.

E. J. EAGEN,

1228 Joseph Vance Bldg.,
Seattle, Wash.
For Mr. Hewes.

L. PRESLEY GILL,

2800 First Ave.,
Seattle, Wash.,
For International Union of Operating Engineers, Local 370, A. F. of L.

United States of America
National Labor Relations Board

NLRB 501
(10-20-47)

CHARGE AGAINST EMPLOYER

1. Pursuant to Section 10(b) of the National Labor Relations Act, the undersigned hereby charges that

(Name of employer): Guy F. Atkinson Company and J. A. Jones Construction Co.

(Address of establishment): North Richland, Wash.

(Number): Employing unknown workers.

(Nature of business): Construction at Hanford Project.

has engaged in and is engaged in unfair labor practices within the meaning of Section 8(a) subsections (1) and (3) of said Act, in that:

2. On or about February 19, 1948, acting by and through its officers, agents and employees, the company wrongfully and illegally discharged the undersigned, Chester R. Hewes; and prior to and at all times since November 1, 1947, it has wrongfully and illegally required prospective employees and regular employees, particularly those doing work regularly and customarily performed by machinists, to become or agree to become members of Local 370 of the International Union of Operating Engineers and has made it a general practice to discriminate

in regard to the hire and tenure of employment in order to encourage membership in said Local 370 under the pretext of complying with an alleged agreement dated August 16, 1947, but which alleged agreement does not describe an appropriate unit for machinists and does not give Local 370 any authority to require closed shop conditions as to people who are not its members, particularly machinists, all in violation of Section 8 (a) (3).

By each of the aforesaid acts and various other acts and statements, the company, by its officers, agents, and employees has interfered with, restrained, and coerced its employees in the exercise of their rights guaranteed by Section 7 of said Act, in violation of Section 8 (a) (1) of said Act.

The undersigned further charges that said unfair labor practices are unfair labor practices affecting commerce within the meaning of said Act.

3. (Paragraphs 3, 4, and 5 apply only if the charge is filed by a labor organization.) The labor organization filing this charge, hereinafter called the union, has complied with Section 9(f) (A), 9(f)(B)(1), and 9(g) of said Act as amended, as evidenced by letter of compliance issued by the Department of Labor and bearing code number ..... The financial data filed with the Secretary of Labor is for the fiscal year ending .....

A certificate has been filed with the National Labor Relations Board in accordance with Section 9(f)(B)(2) stating the method employed by the union in furnishing to all its members copies of the

financial data required to be filed with the Secretary of Labor.

4. Each of the officers of the union has executed a non-communist affidavit as required by Section 9(h) of the Act.

5. Upon information and belief, the national or international labor organization of which this organization is an affilaite or constituent unit has also complied with Section 9(f), (g), and (h) of the Act.

6. (Full name of labor organization, including local name and number, or person filing charge): Chester R. Hewes, 803 So. 11th Ave., Yakima, Wash.

(Address): .....

(Telephone number): 22317.

7. (Full name of national or international labor organization of which it is an affiliate or constituent unit): .....

(Telephone number): .....

By /s/ CHESTER R. HEWES.

(Signature of representative or person filing charge.)

Do Not Write in This Space

Case No. 19-CA-28

Date filed: 2-27-48

9(f), (g), (h) cleared .....

Subscribed and sworn to before me this 27th day

of February, 1948, at Seattle, Washington, as true to the best of deponent's knowledge, information and belief.

/s/ P. H. WALKER,
(Board Agent.)

(Submit original and four copies of this charge.)
[Admitted in evidence as General Counsel's Exhibit No. 1-A.]

United States of America, Before the National Labor Relations Board, Nineteenth Region

Case No. 19-CA-28

In the Matter of:

GUY F. ATKINSON CO., a Corporation; J. A. JONES CONSTRUCTION CO., a Corporation, d/b/a GUY F. ATKINSON CO. and J. A. JONES CONSTRUCTION CO.

and

CHESTER R. HEWES

and

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 370, AFL,
Party to the Contract.

COMPLAINT

It having been charged by Chester R. Hewes, 803 S. 11th Avenue, Yakima, Washington, that Guy F. Atkinson Co. and J. A. Jones Construction Co., a

joint venture, hereinafter called Respondent, has engaged in and is now engaging in certain unfair labor practices affecting commerce as set forth and defined in the National Labor Relations Act, 49 Stat. 449, as amended by 61 Stat. 136, herein called the Act, the National Labor Relations Board, herein called the Board, acting through its General Counsel and by the Regional Director for the Nineteenth Region, designated by the Board's Rules and Regulations, Series 5, Section 203.15, hereby issues this complaint and alleges as follows:

I.

Guy F. Atkinson Co. is and has been at all times herein mentioned, a corporation duly organized and existing by virtue of the laws of the State of Nevada. J. A. Jones Construction Co. is and has been at all times herein mentioned a corporation duly organized and existing by virtue of the laws of the State of North Carolina. At all times material herein, said above-named corporations associated themselves together in a joint venture, doing business under the firm name and style of Guy F. Atkinson Co. and J. A. Jones Construction Co.

II.

At all times herein mentioned Respondent has maintained an office and place of business at Richland, Washington, where it is engaged in performing construction work pursuant to Letter Subcontract No. C-133 and agreement made July 25, 1947, with General Electric Co., a corporation.

III.

Respondent in the course and conduct of its business at Richland, Washington, for the period from July 29, 1947, to April 6, 1948, caused to be purchased and delivered to it building materials of the approximate value of $20,000,000.00. Approximately $2,500,000.00 in value of such materials were shipped in interstate commerce from States of the United States other than the State of Washington. In addition, approximately $9,500,000.00 in value of such materials were purchased, fabricated and originated at places outside of the State of Washington and were transported to vendors within the State of Washington and thereafter were transshipped to Respondent from points within the State of Washington.

IV.

International Association of Machinists, herein called IAM, and International Union of Operating Engineers, Local 370, affiliated with the American Federation of Labor, herein called Engineers, each is a Labor Organization within the meaning of Section 2, Sub-division (5) of the Act.

V.

On or about February 19, 1948, Respondent did discharge Chester R. Hewes, employed at its operations at Richland, Washington.

VI.

Respondent has since on or about February 15,

1948, failed to, refused to, and continues to refuse to reinstate the said Chester R. Hewes to his former or substantially equivalent position of employment.

VII.

Respondent did discharge and refuse to reinstate the said Chester R. Hewes for the said employee joined or assisted IAM or engaged in other concerted activities for purposes of collective bargaining or other mutual aid and protection or for the reason that he did not become a member in good standing of Engineers.

VIII.

Since on or about November 1, 1947, Respondent has solicited its employees to become and remain members of Engineers.

IX.

On or about August 15, 1947, Respondent did enter into a written agreement with the Building and Construction Trades Department of the AFL, of which Engineers was a signatory Union, relating to terms and conditions of employment of its employees at its Richland Operations, which agreement required of its said employees, as a condition of continued employment, membership in Engineers.

X.

The agreement referred to in paragraph IX was executed and made effective by Respondent at a time when Engineers did not represent a majority

of the employees at its Richland operations within an appropriate unit, nor in any unit of Respondent's employees at the Richland operations that was appropriate for collective bargaining.

XI.

The agreement referred to in paragraph IX was executed and made effective by Respondent at a time when IAM given to Respondent actual notice of its claim to represent employees in an appropriate unit consisting of employees employed as machinists, customarily and regularly performing work of machinists.

XII.

During all of the time said Hewes was employed by Respondent, said Hewes performed work regularly and customarily performed by Machinists and not the type of work performed by Engineers or coming within the terms of said contract. In spite of that fact, on or about February 16, 1948, Engineers by letter requested the discharge of said Hewes, and acting pursuant to said letter, Respondent did discharge Hewes on or about February 19, 1948.

XIII.

By reason of the acts described in paragraphs VIII, IX, X, and XI the said agreement described in paragraph IX is invalid and in violation of the Act, and interfers with, restrains and coerces Respondent's employees in the exercise of rights guaranteed by the Act.

XIV.

By the acts described above in paragraphs V, VI, VIII, IX, X and XI and for the reasons set forth in paragraph VII, Respondent did discriminate in regard to tenure of employment of the said Chester R. Hewes and in regard to the hire of other employees at its Richland operations, and did then and is now encouraging membership in Engineers, and thereby engaged in and is engaging in unfair labor practices within the meaning of Section 8 (a) (3) of the Act.

XV.

By the acts described in paragraphs VIII, IX, X and XI, Respondent has assisted and supported and is assisting and supporting Engineers, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (2) of the Act, re-enacted as Section 8 (a) (2) of the Act, as amended.

XVI.

By the acts and for the reasons described in paragraphs V to XV, inclusive, Respondent has interfered with, restrained and coerced and is interfering with, restraining and coercing its employees in the exercise of rights guaranteed in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (a) (1) of the Act.

XVII.

The activities of Respondent as set forth in paragraphs V to XV, inclusive, occurring in connection with the operations of Respondent described in paragraphs II and III, have a close, intimate and substantial relationship to trade, traffic and commerce among the several States of the United States and tend to lead to labor disputes which burden and obstruct the free flow of commerce.

XVIII.

The acts of Respondent as described above constitute unfair labor practices affecting commerce within the meaning of Section 8 (1) and (2) of the Act, re-enacted as Section 8 (a)(1) & (2) of the Act, as amended, and Section 8 (a) (3) and Section 2 (6) and (7) of the Act.

Wherefore, the General Counsel of the Board, on behalf of the Board, on this 28th day of September, 1948, issues this complaint against Guy F. Atkinson Co. and J. A. Jones Construction Co.

/s/ THOMAS P. GRAHAM, JR.
Regional Director National
Labor Relations Board.

[Admitted in evidence as General Counsel's Exhibit No. 1-C.]

Received September 30, 1948.

Before the National Labor Relations Board
Nineteenth Region

[Title of Cause.]

ANSWER OF GUY F. ATKINSON COMPANY AND J. A. JONES CONSTRUCTION CO.

Answering Paragraphs I, II, III, IV, V, VI, and IX, we admit the same.

Answering Paragraphs VII, VIII, X, XI, XII, XIII, XIV, XV, XVI, XVII, and XVIII, we deny the same and the whole thereof.

First Affirmative Defense

I.

That the Respondent is not engaged in "Commerce," nor do its said operations "affect commerce" within the meaning of the NLRA as Amended.

II.

That it would not effectuate the purposes of the NLRA as Amended for the NLRB to assume jurisdiction over the Respondent in its said activities.

Second Affirmative Defense

I.

That the work performed by Respondent is known as building trades construction work. That by custom immemorial in the industry, persons and firms desiring said work to be done require the execution of contracts well in advance of the com-

mencement of the work . That by the proposals, the said persons and firms can ascertain their costs for the job, and the time for completion. That if said proposals are acceptable, a contract results.

That the prospective contractors, in accordance with said custom, cannot ascertain what the cost of labor will be nor the availability of labor, without executing a labor contract with the Union able to supply the requisite skilled mechanics in the numbers and at the times required.

II.

That Subcontract G-133 was entered into effective as of July 25, 1947, in contemplation of the Labor Agreement of August 15, 1947, as the said Local 370 had the only available pool of workmen required for the work to be done under the said Subcontract.

That the said Respondent during all times material to this proceeding was required on the said work to employ persons skilled at the crafts represented by the signatories to said agreement, the only available pool therefor being under the exclusive control of said signatories.

III.

That said Local 370 of the International Union of Operating Engineers and the other labor signatories to said labor agreement by custom and practice during all times material to this proceeding operated only under so-called "closed-shop" conditions and in close agreement with each other

whereby one craft would not enter into any agreement nor work on the job unless all of the other employees were covered by similar so-called "closed-shop" conditions.

IV.

That because of said customs, and the control over all of the manpower by Local 370 and by the other signatory labor Unions the Respondent was required to execute the Union security provisions of said agreement and to comply therewith.

That without said execution and compliance the work covered by said contract No. G-133 could not be performed by Respondent nor by any other contractor.

That all of said work is of vital necessity to the defense of the country.

Third Affirmative Defense

I.

That the NLRB has heretofore and does now refuse to accept jurisdiction over the work covered by the Respondent herein, and has refused and neglected to make any determination as to the appropriate bargaining unit and the representatives of such employees.

That until the NLRB accepts jurisdiction for said purposes, the General Counsel should be barred from filing and prosecuting this complaint.

Wherefore, Guy F. Atkinson Company and J. A. Jones Construction Co., Joint Venturers, having

fully answered the complaint of the General Counsel, pray that the same be dismissed.

/s/ KENNETH H. GEDNEZ,
Ass't General Manager.

Subscribed and sworn to before me this 13th day of October, 1948.

[Seal] /s/ E. A. KIGER,

Notary Public, in and for Benton County, State of Washington.

My Commission expires July 23, 1948.

Attn: W. C. Robbins, Manager, Contracts and Claims, Box 742, Richland, Washington.

[Admitted in evidence as General Counsel's Exhibit No. 1-G.]

[Title of Cause.]

ANSWER OF INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 370 AFL

Answering paragraphs I, II, III, IV, V, VI, and IX, we admit the same.

Answering paragraphs VII, VIII, X, XI, XII, XIII, XIV, XV, XVI, XVII, and XVIII, we deny the same and the whole thereof.

First Affirmative Defense

I.

The said Chester R. Hewes did on or about October 27, 1947, enter into a contract with the said

Local 370 whereby he agreed to become and remain a member of Local 370 during the whole period of his employment with the said Respondent. That said contract is attached hereto as Exhibit I.

That, nevertheless, the same Hewes has violated the following provisions thereof:

A—Obligation

1. "remain a member until expelled or until I have been granted a withdrawal card.

2. "I will not violate any of the provisions of said constitution, Laws, and Rules governing the same."

3. "I further promise, in the event of a claimed grievance by me against the Local Union * * * that I will faithfully observe the procedure of and fully accept the findings of, the Final Board and Appellate Tribunals set up within the Local Union and said International Union."

4. "I further promise that I will not become a part to any suit at law or in equity against this Local Union * * * until I have exhausted all remedies allowed to me by the said Constitution. * * *"

B—Application for Membership

1. "I will remain a member until expelled."

2. "I will not enter into or sign any individual contract of employment * * * which provides for the withdrawal of my membership from this Union;"

3. "I further agree in the event of a claimed

grievance against the Union to faithfully observe the procedure of, and fully accept as final the findings of the Trial Boards within the order;"

4. "I hereby expressly waive any right to institute proceedings in any court of law or equity against the Union;"

5. "I further agree to conform to and abide by all laws, rules, and regulations and orders stipulated in the Constitution and By-laws, or given by those in authority."

6. "I also agree to pay an entrance fee of 40% of $100 which shall include dues in advance. I further agree that this entrance fee shall be fully paid by 30 days from date (October 27, 1947.)"

II.

That relying upon said contract with Hewes, and other similar contracts with other employees desiring employment under the jurisdiction of Local 370, Local 370 did expend a large sum of money in securing an available pool of workers available to work at the job of Heavy Duty Mechanic; and concurrently the said Local 370 did engage in collective bargaining with the Respondent and other similar contractors for the purpose of securing work for such persons.

III.

That in consideration and relying upon said contract, the said Local 370 did dispatch the said Hewes to the job of the Respondents as a Heavy Duty Mechanic.

IV.

That the said Hewes did not comply with any of the conditions thereof in accordance with the said contract, and he was thereafter and therefor removed from the job.

Second Affirmative Defense

I.

That the said Hewes did on or about October 27, 1947, designate Local 370 as his sole and exclusive collective bargaining agency, which has never been revoked and has been in effect at all times material to this proceeding.

Third Affirmative Defense

I.

That the Respondent is not engaged in "Commerce," nor does its said operations "affect commerce" within the meaning of the NLRA as Amended.

II.

That it would not effectuate the purposes of the NLRA as Amended for the NLRB to assume jurisdiction over the Respondent in its said activities.

Fourth Affirmative Defense

I.

That the work performed by Respondent is known as building trades construction work. That by custom immemorial in the industry, persons and firms desiring said work to be done require the execution of contracts well in advance of the commencement of the work. That by the proposals, the

said persons and firms can ascertain their costs for the job, and the time for completion. That if said proposals are acceptable, a contract results.

That the prospective contractors, in accordance with said custom cannot ascertain what the cost of labor will be nor the availability of labor, without executing a labor contract with the Union able to supply the requisite skilled mechanics in the numbers and at the times required.

II.

That the said No. C-133 contract of July 25, 1947, was entered into in contemplation of the labor agreement of August 15, 1947, as the said Local 370 has the only available pool of workmen required by said No. C-133 contract.

That during all the times material to this proceeding the said Respondent was required on said job to employ persons skilled at the crafts represented by the other signatories to said agreement, the only available pool therefor being under the exclusive control of said signatories.

III.

That said Local 370 and the other labor signatories to said labor agreement by custom and practice during all times material to this proceeding operated only under so-called "closed-shop" conditions and in close co-operation with each other whereby one craft would not enter into any agreement nor work on the job unless all of the other employees were covered by similar so-called "closed-shop" conditions.

IV.

That because of said customs, and the control over all of the manpower by Local 370 and by the other signatory labor Unions the Respondent was required to execute the Union security provisions of said agreement and to comply therewith.

That without said execution and compliance the work covered by said No. C-133 contract could not be performed by Respondent nor by any other contractor.

That all of said work is of vital necessity to the defense of the country.

Fifth Affirmative Defense

I.

That the NLRB has heretofore and does now refuse to accept jurisdiction over the work covered by the Respondent herein, and has refused and neglected to make any determination as to the appropriate bargaining unit and the representatives of such employees.

That until the NLRB accepts jurisdiction for said purposes, the General Counsel should be barred from filing and prosecuting this complaint.

Sixth Affirmative Defense

I.

That the work performed by the said Hewes is within the Espionage laws of the United States and is considered by the Atomic Commission as being highly secret. That Local 370 has not been able to acquire the information with respect to the

full nature of his work, and the NLRB will not permit the disclosure nor the acquisition of said information. That without said information, the said Local 370 is prejudiced in its defense in this case.

Wherefore, the International Union of Operating Engineers, Local 370 AFL, having fully answered the complaint of the General Counsel prays that the same be dismissed.

/s/ L. PRESLEY GILL,
Attorney.

State of Washington,
County of King—ss.

Arthur A. Rossman, being duly sworn on oath, deposes and says:

That I am the duly elected, qualified and acting business manager of International Union of Operating Engineers, Local 370, AFL, one of the parties herein; that as such officer I am authorized to execute this affidavit;

That I have read the within and foregoing answer of said Union, that I know the contents thereof and verily believe the same to be true.

/s/ ARTHUR A. ROSSMAN.

Subscribed and sworn to before me, this 15th day of October, 1948.

[Seal] /s/ LEILA BIRCHER,
Notary Public in and for the State of Washington, residing at Spokane.

[Admitted in evidence as General Counsel's Exhibit 1-H.]

Before the National Labor Relations Board
Nineteenth Region

[Title of Cause.]

AMENDED ANSWER OF GUY F. ATKINSON COMPANY AND J. A. JONES CONSTRUCTION CO.

Comes Now the Respondent to amend its answer dated October 13, 1948, in the above-entitled case, in the following particular only:

The First Affirmative Defense of Respondent is hereby deleted and stricken out in its entirety; with the exception of the foregoing amendment, the answer of Respondent shall remain as written.

/s/ KENNETH H. GEDNEZ,
Assistant Manager.

Subscribed and sworn to before me, this 15th day of October, 1948.

[Seal] /s/ E. A. KIGER,

Notary Public in and for Benton County, State of Washington.

My Commission expires July 23, 1950.

Attn: W. C. Robbins, Manager, Contracts and Claims, Box 742, Richland, Washington.

[Admitted in evidence as General Counsel's Exhibit 1-I.]

Received October 20, 1948.

[Letterhead]

International Union of Operating Engineers
Washington (1), D. C.

Office of the General President

June 2, 1949.

Dear Mr. Herzog:

This letter refers to Case No. 19-CA-28 in which are involved Local Union No. 370 of this organization—the International Union of Operating Engineers—and Guy F. Atkinson Company and J. A. Jones Construction Company.

Very likely you already have before you the Intermediate Report as written by Trial Examiner Ward, together with a copy of the "Exceptions of Engineers Union Local 370" which latter document, I understand, has been distributed among the several parties at interest.

The case is one of more than ordinary interest and it seems to me one in which, if the Trial Examiner is upheld a precedent will be established which will in the future rise up not only to plague organizations of labor and employers of labor but well may haunt the National Labor Relations Board itself. I do not here discuss the issues nor do I set forth the case in detail. That can better be done by the documents you have before you.

In extreme brevity the case is simply this: Over many years it has been the well established practice—so well established that it has become accepted as a principle—that labor contracts covering con-

struction operations have been negotiated and consummated prior to the beginning of construction activities. This is a sound practice for it readily appears that were negotiations deferred until work had begun the contractors would enter upon projects with but little idea of the wages they were to pay, the conditions under which they were to work and so on through a considerable list not necessary here to set forth. The results might well be, in such instances, bankrupted contractors, deeply dissatisfied employees and a ruptured local economy.

The Intermediate Report of Trial Examiner Ward negates the thoroughly recognized practice. It appears to be based, in considerable part, on the ground that the labor contracts with the contractors were entered in to before the beginning of the actual work of construction. If the Intermediate Report is upheld by the Board the situation not only with respect to organizations of labor but with respect to the entire construction industry must become grave indeed.

Because of the importance of this case and the far reaching effects of the Intermediate Report an oral argument before the Board becomes a highly desirable consideration. Request for such argument is both earnestly and respectfully made by this letter. I hope I may have an affirmative reply from you.

With the best of personal wishes, please believe me to be with cordial regards

Yours very sincerely,

/s/ HERBERT WOODS,

Director of Research for Wm. E. Maloney, General President.

Paul M. Herzog, Chairman,
National Labor Relations Board,
815 Connecticut Avenue,
Washington, D. C.

HW/mll

Filed in formal file.

Before the National Labor Relations Board
Division of Trial Examiners

[Title of Cause.]

EXCEPTIONS OF GUY F. ATKINSON COMPANY AND J. A. JONES CONSTRUCTION COMPANY, RESPONDENT

Respondent excepts to the Intermediate Report of the Trial Examiner as follows:

1. The Trial Examiner has found that Respondent is engaged in Interstate Commerce within the meaning of the Act and holds that the Board has and should assume jurisdiction of the instant matter. (Page 5, Line 35, Intermediate Report.)

Respondent excepts to that part of the Trial Examiner's findings which holds that the Board should assume jurisdiction and respectfully urges

that the Board decline to assume jurisdiction for the reasons set forth below:

a. The issue was raised as No. 1 of Defenses in the Supporting Brief of Respondent.

b. The Board may refuse to assume jurisdiction when in its opinion "The assertion of jurisdiction would not affectuate the policies of the Act." H. F. Smith, d.b.a., A-1 Photo Service, 83 NLRB 86.

In the language of the Board in the A-1 Photo Case (Supra):

> "For the above reasons we find contrary to the General Counsel's contention that the Board has discretionary authority to dismiss complaints for policy reasons even though commerce is affected." (See, also, Fred Montgomery d.b.a., Pereira Studio, 83 NLRB 87.)

The Trial Examiner has cited on this point, In re: Brown & Root, Inc., 77 NLRB 436, as authority for the assumption of jurisdiction by the Board in construction cases. Respondent respectfully suggests that the Board's decision to assume jurisdiction in the Brown Case may have been influenced by factors which are not present in the subject case, to wit: In the Brown case the Board found that:

> "Stoppage of work on the Bull Shoals dam—would delay the production of electricity which will probably be sold in Interstate Commerce."

In the present case, it is expressly provided by statute that the products to be derived from the use of facilities built in the construction program

at Hanford Works are at all times property of an instrumentality of the United States Government and never enter the stream of Interstate Commerce. (Atomic Energy Act 1946, Title 42 USCA 1801.)

* * *

3. The Trial Examiner has ruled (Page 12, Intermediate Report) that Hewes' discharge was effected by Respondent in reliance upon an illegal contract and hence the provisions of that contract may not be relied upon by Respondent as a defense to its action. Respondent excepts to this ruling as follows:

a. It is not demonstrated by the record that on August 16, 1947, "The Engineers did not represent any employees of the Respondent in an appropriate unit." To the contrary testimony adduced at the hearing clearly indicates that a substantial number of Respondent's manual employees were doing work within the asserted jurisdiction of Engineers. (See Molthan's testimony cited to Official Transcript under (2) above.)

b. Contract of August 16, 1947, was entered into with the several Building Trades Unions by Respondent in reliance upon Respondent's extensive "prior" experience in the heavy construction field. (Molthan—Page 130 Off Trans.)

c. In entering into the contract of August 16, 1947, Respondent was effectively required to depend upon the jurisdictional assertions of the several unions signatory thereto. (Molthan —Page 131 Off Trans.)

d. The Contract of August 16, 1947, was en-

tered into by Respondent at a time when it had no actual knowledge of any claims of machinists. (Molthan—Pages 131 and 132 Off Trans.)

e. Hewes' discharge was effected by Respondent pursuant to the terms of its contract of August 16, 1947, with the Engineers, only after close scrutiny by, and the reliance upon the opinion of competent counsel. (Molthan—Pages 108-109 Off Trans.)

4. The Trial Examiner has found that Respondent has "enforced its illegal recognition of the Engineers—by the discharge of Hewes and other employees on February 18, 1948. (Page 15, Line 31, and Page 16, Line 34, Intermediate Report.)

a. Respondent excepts to the above finding in toto, and specifically to the implication that other employees were discharged in the same manner as was Hewes. The present charge before the Board is concerned solely with the facts surrounding Hewes' discharge; nor does the record indicate that other employees were discharged.

5. The Trial Examiner has recommended that Respondent re-instate Hewes to his former or substantial equivalent position.

"without prejudice—and make him whole for any loss of pay—by payment to him of a sum of money equal to that he would normally have earned as wages from the date of his discharge to the date of Respondent's offer of reinstatement, less his net earnings during such period."

Respondent excepts to all of the above, and specifically excepts to the extent that the holding of the Trial Examiner assumes that the alleged discrimination has continued to the present. The record indicates that the contract (G. C. Exhibit No. 5) expired August 10, 1948 (Molthan—Page 112 Off Trans). Since that date Respondent has operated under a contract which requires National Labor Relations Board authorization of Agency on Union security (Hewes Exhibit 1).

Hewes has been free to apply for employment in his former position at any time, but to the best of Respondent's knowledge has failed so to do (Hibberd—Pages 69 and 70 Off Trans), nor did the condition of Hewes' discharge prohibit his re-employment at any time since August 10, 1948. (Hibberd—Page 69 Off Trans.)

6. The Trial Examiner denied Respondent's Motion to Strike (Page 3, Line 22 Off Trans) certain testimony relevant to "jurisdictional aspects" and deemed by Respondent to be irrelevant to the issues to be considered in the instant matter. Respondent excepts to the ruling above, as follows:

a. Much testimony was adduced by Hewes, Engineers, and the General Counsel which intended to demonstrate that work performed by "Heavy Duty Mechanics," "Heavy Duty Mechanics Specialists" (Respondent's Job Classifications) was in fact similar to work normally done by "Machinists" (Hewes' designation).

Note—See, also, Paragraph XII of the Complaint, and further Motion of Respondent directed toward this paragraph. (Pages 38 and 39 Off Trans.)

Respondent excepts specifically to Trial Examiner's refusal to strike testimony as follows:

(Refer to pagination of Official Transcript)

1. Pages 81 through 86.
2. Page 99.
3. Pages 115 through 117.
4. Page 140 (Mr. Eagen's Question).
5. Page 155.
6. Page 163 (Mr. Eagen's recross-examination).
7. Pages 173 through 187 (Mr. McBurnie's testimony).
8. Pages 190 through 193 (Mr. Dewing's testimony).
9. Pages 245 through 249.
10. Pages 254 through 257 (Mr. Clarke's testimony).

The above testimony was admitted over exceptions by the Respondent that the jurisdictional claims of the respective Unions were presently scheduled to be heard in an appropriate forum (See, also, Engineer's offer of proof, Page 251 Off Trans).

Respondent should not be penalized for having acted in good faith in entering into a contract with the Engineers at a time when no actual knowledge of machinists interest existed. As was shown by

the testimony, methods of settling jurisdictional problems exist within the province of the labor organizations themselves, and machinery is provided whereby the National Labor Relations Board may make a proper determination. The jurisdictional problems of the machinists and Engineers were schedules for hearing at the time the instant unfair labor practice charge was heard, and the matter of the conflicting jurisdictional claims has since been heard although no decision has as yet been handed down by the Board.

The Board has recently stated (Los Angeles Building Trades Counsel, 83 NLRB 76), in a case involving conflicting jurisdictional claims of machinists and millwrights that the Board will not usurp the Employer's right to "award work" as he sees fit.

> "In reaching this conclusion we are aware that the employer in most cases will have resolved, by his own employment policy, the question as to which organization shall be awarded the work. Under the statute as now drawn, however, we see no way in which we can, by Board reliance upon such factors as tradition or custom in the industry, overrule his determination in a situation of this particular character."

The facts are not basically dissimilar from the instant case, and the reasoning of the Board may be well applied with equal vigor here. In effect, Respondent made an assignment of work by contract, the propriety of the assignment is challenged

and Respondent penalized—not through the medium of the machinery established by statute for that purpose but rather through an Unfair Labor Practice charge, which seeks to pre-try issues properly determinable elsewhere.

The Respondent excepts to the ruling of the Trial Examiner that Respondent's good faith does not constitute a defense.

It has been demonstrated by the Record that Respondent in contracting with the Engineers followed a pattern of procedure which has been established by long custom in the construction industry. Further, that the exigencies of the construction program made necessary the immediate manning of the job to the greatest extent possible within a limited time; that Respondent served the best interest of its Prime Contractor and the Atomic Energy Commission by assuring an adequate labor supply by the only means available to it; that its contract with the Engineers was entered into for the sole purpose of accomplishing the purpose of its letter Subcontract G-133 with lack of knowledge of any interest of the machists in the premises and with no intent to prejudice the rights of any individual or labor organization.

GUY F. ATKINSON CO., and
J. A. JONES CONSTRUCTION CO.,
/s/ WILLIAM C. ROBBINS.

Filed in formal file.

Before the National Labor Relations Board

[Title of cause.]

EXCEPTIONS OF ENGINEERS UNION LOCAL 370

The Engineers Union Local 370, hereinafter referred to as the Engineers, excepts to the Intermediate Report as follows:

* * *

The Trial Examiner erred in ruling that the Engineers had no members employed at the time of the contract—page 5, line 20; page 12, line 3. He relied on the testimony of respondent's James Moulthan who was, in the quoted excerpt (page 10, line 22) referring to the general practices.

The record shows that the Engineers had members employed at the time of negotiating and executing the contract:

James Moulthan testified, at page 150, that the employer received the Letter Orders G-133 on July 28, 1947, and that the first employes were hired the next day, July 29, 1947. At pages 152-7 he testified that the first employes on the job were engineers, common laborers, and teamsters in the ratio of about one-third each, and that they needed 1,000 of those men immediately. Moulthan, referring to the payroll exhibits, testified on page 125 that on August 16, 1947, the date the contract was signed, the employer had 103 manual employees of whom two were heavy duty mechanics. In accordance with his other testimony, related before, the 103 em-

ployes would be divided approximately 33 members of the Engineers Union. This refutes the Trial Examiner's report that on that date the union had no members employed.

3. Refusing to Dismiss the proceedings because the gist of the complaint is that the Engineers were not the bargaining agency for an appropriate unit in that the NLRB has heretofore refused to accept any jurisdiction over representation questions at the Hanford job.

Clarke testified (p. 230) that Local 370 has filed 9 petitions for union security authorization and has been informed that the NLRB will decide in the Spring of 1949 whether to process these petitions.

Further proof was rejected as shown by the offers:

(a) Local 370 wanted Exhibit 4 reserved (p. 234) for a recital of "R"—petitions filed since the Hanford project commenced. The General Counsel refused to make this information available, and the Trial Examiner refused to receive the Exhibit. Offer appears on page 234 (a stenographic error appears by incorrectly stating that the witnesses are not in attendance).

(b) An offer explaining the reason for filing U A petitions was rejected (p. 242).

These offers show that for five years the NLRB has refused to process R—petitions. In this Affirmative Defense we assert that the general Counsel should be barred from contending that Respondent and Local 370 fixed a bargaining unit and that Re-

spondent recognized an agency which the Board has always refused to determine.

During the period that the Board refuses to decide right and wrong, the General Counsel should be barred from prosecuting what appears to him to be a wrong.

4. Refusing to Dismiss the proceedings on the ground that Hewes, the charging party, agreed to the discharge.

The membership card of Hewes appears as Local 370 Exhibit 3. This obligated Hewes to pay his initiation fee of $40 within 30 days after November, 1947. The obligations permitted removal from the job for non-compliance.

This is not a case of Local 370 removing a non-member from the job. Hewes went to the union for a job and was referred to Respondent after he acknowledged his obligations to Local 370.

The Respondent would have spent 2 or 3 million dollars recruiting manpower in the absence of the contract (G. C. Ex. 5—Moulthan p. 141). Local 370 incurred a portion of this expense. The job required 1,000 men immediately of which one-third were engineers—Moulthan p. 155-7. These expenditures furnished the consideration for the contract with Hewes—Local 370 Ex. 3.

5. Refusing to find that a national emergency required the execution and compliance with the labor agreement of August 16, 1947.

Letter Order G 133 dated July 25, 1947, authorized a joint venture under the name of the Respondent to enter upon a construction job.

There was extreme urgency and insufficient time to prepare a subcontract for Respondent.

Moulthan 129, 149, 155-7, 161.

* * *

8. The Trial Examiner assumes that the alleged discrimination has continued without interruption.

The current contract (Hewes Ex. 1) took effect August 11, 1948—Moulthan 112. G. C. Exhibit 5 expired midnight August 10, 1948.

The current contract requires NLRB authorization of agency and union security (Hewes Ex. 1)—Moulthan 145 and is open shop in form.

The job has been open shop since August 10, 1948, and no employee is required to get union clearance.

Moulthan 145, 11-2

Hibberd 81

Hewes has not since February 18, 1948, asked for his job back.

Hibberd 69-70, 81

Hewes was not discharged on the basis that he would never be re-hired.

Hibberd 69-70, 81

G. C. Exhibit 10—Lay-off card.

9. The Trial Examiner erred in finding that the Machinists Union had jurisdiction over the work of Hewes and that Hewes was dispatched as "Machinist (specialist)."

By long custom the Engineers have always repaired their own equipment—Moulthan 155.

The AFL, at its New Orleans Convention in 1944

without the objection of the IAM delegates, awarded to the Engineers exclusive jurisdiction over repair, maintenance and machine work at the site of construction. This resolution appears in Local 370 Exhibit 4, in the Rejected file.

There is no question but the work of Hewes and "3,000 Shop" was at the site. Hewes could see the construction equipment being operated by Local 370 members 50-75 yards from the Shop—McBurnie 180.

Hewes was hired as a heavy duty mechanic.

Local 370 gave a 60% credit on initiation fee to members of other unions—Clarke 217. The word "machinist" and "Machinist Specialist" was written on Union records to show justification for the credit—Clarke 217, G. C. Ex. 8.

However, the words "machinist specialist" was written on the Introduction card, G. C. Ex. 13, by mistake of the "office girl"—Clarke 213.

The union had no such jobs as "machinist," "machinist specialist," or "heavy duty mechanic specialist"—Clarke 213.

Hewes testified that the obliteration of "machinist specialist" on his Introduction Card, G. C. Ex. 13, was not present when he turned in the card to Respondent's personnel office—Hewes 198.

The first form filled by all employees is a confidential Security form which is retained by G. E. The second form was G. C. Ex. 16—Hibberd 72. This form was filled by the person who had received the Introduction Card. All job blanks on G. C. Ex. 16 listed "heavy duty mechanic 39-1."

Hewes was hired as heavy duty mechanic or welder at the rate of $1.85 under Schedule A of G. C. Ex. 6; he was not hired as machinist specialist, nor as machinist; and he worked at all times as heavy duty mechanic—Hibberd 73-75.

There was no job as machinist and none hired as such—Hibberd 83.

10. The Trial Examiner erred in finding that persons other than Hewes were discharged, in his statement at the bottom of page 7 as Note 10. The letter of February 16 listed Hewes and other employees to be discharged. This letter was withdrawn and a special letter on the same date was sent asking for the discharge of Hewes. On page 109, Moulthan stated that separate letters were also sent covering the other employees who had been listed in the first letter. Moulthan did not state that these other employees were discharged. Moulthan states that he made a personal investigation of each request which resulted in a discharge and he only described an investigation for Hewes. There is not a word in the transcript indicating that any person other than Hewes was discharged.

11. The Trial Examiner erred in not dismissing the proceedings and in not finding that the contract of August 16, 1947, complied with the proviso of the Taft-Hartley Law which permitted the execution of closed shop agreements for a period not longer than one year if such agreements were executed prior to August 22, 1947. The closed shop clause was legal under the Taft-Hartley Law, and

the discharge of Hewes was, therefore, justified on the basis of the contract.

Wherefore, the Engineers Union, Local 370 asks that the complaint be dismissed.

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 370 AFL,

By L. PRESLEY GILL,
Its Attorney.

May 27, 1949.

Received June 27, 1949.

Before the National Labor Relations Board
Division of Trial Examiners

[Title of Cause.]

SUPPLEMENTAL EXCEPTIONS OF GUY F. ATKINSON COMPANY AND J. A. JONES CONSTRUCTION COMPANY, RESPONDENT

Respondent further excepts to the Intermediate Report of the Trial Examiner as follows:

1. The Trial Examiner has found that Respondent might not properly enter into a Collective Bargaining Agreement with the Engineers on August 16, 1947, by reason of the fact that the testimony does not disclose that the Engineers represented any employees of the Respondent in an Appropriate Unit.

Respondent respectfully urged that the ruling of

the Trial Examiner overlooks the historical pattern of labor contracting followed by Western Contractors and Labor Organizations for many years. Deriving from the geographic isolation of many major construction projects in this section of the country, the pattern of pre-job conferences arose as a solution to the problems of both contractors and labor organizations for successfully manning jobs in isolated areas. Heavy construction contractors depended upon the manpower solicitation of the Unions which were so organized as to be able to procure labor from urban centers, often very removed from the jobsite.

The meetings held between representatives of Respondent and the several Unions signatory to the Collective Bargaining Agreement of August 16, 1947, represented the historically accepted, and only practicable method by which necessary skilled labor could be obtained. In effect the Trial Examiner's ruling condemns this custom, yet had Respondent refused to enter into a Collective Bargaining Agreement with the several labor organizations representing the crafts involved in the work until such time as a unit determination could have been made pursuant to election, Respondent might have risked a charge that it had failed to bargain in good faith along the lines of a precedent formerly established by both the construction industry and the Building Trades Unions.

Molthan's Testimony of Cross-Examination by Mr. Walker (Page 128 TR):

> "A. That was our project at the time we negotiated the present contract which is under

attack here. We relied upon the Building Trades Department of the American Federation of Labor to man that job. When we came into the Hanford area, we had no Associated General Contractors area agreement for our purpose. Ordinarily the Associated General Contractors will negotiate area agreements and then members coming into the area to do any kind of work, build a dam, a highway or a tunnel, avail themselves of that agreement. The Spokane Chapter of the Associated General Contractors exercises what, I imagine, a Union would term jurisdiction over the area in which the Hanford Works are set up. They had no agreement for our purposes, so it was necessary for us to negotiate an agreement, and we went into the—to the International Unions with whom we always do our business and asked through the agency of Mr. Harry Aimes, who is Executive Secretary of the Washington State Department of the Building Trades and Construction Department of the American Federation of Labor, to arrange for our meeting with all the representatives, International or Local, that could be made available to us on short notice * * *"

The Trial Examiner's ruling represents a threat to an established practice which has made possible the manning and orderly administration of labor relations on projects such as the Hungry Horse Dam, McNary Dam, Detroit Dam, Ross Dam, large Army and Navy base construction projects by

major construction concerns who would have been seriously jeopardized in their competitive bidding on further government projects had they been unable to rely upon this custom.

Area Agreements are entered into by individual chapters of the Associated General Contractors of America, Inc., with the several Building Trades Unions to establish job conditions within a jurisdictional area and which subsists usually for one year. Pursuant to the terms of most area agreements, special job agreements are contemplated to take care of particular circumstances surrounding individual jobs. Inability on the part of the contractor and the several crafts to discuss conditions and requirements and to reduce their understandings to an agreement prior to the start of work would seriously prejudice both labor and contractor.

The following is an extract for a typical AGC Agreement and cited as Portland Chapter AGC with International Union of Operating Engineers, Local 701, Portland 1949:

> "This agreement, insofar as work affected by it is concerned, shall supersede any existing agreements between the parties hereto who shall be concerned, but this clause shall not be interpreted as in any way affecting such existing agreement with respect to work not covered by this agreement.
>
> "Special Job Agreements may be negotiated between Contractors and Unions who are or who become parties to this agreement, when such Special Job Agreements are deemed ad-

visable because of the size, duration, location or other characteristics of the particular project involved. The terms of such Special Job Agreements shall be as consistent as parcticable with the terms of this agreement."

Respondent urges that the Board consider the exception and argument presented above and further requests that in view of the affect that the Trial Examiner's ruling will exert on the entire industry, the Board remand the instant case to the Trial Examiner for the taking of further testimony relative to this point.

GUY F. ATKINSON COMPANY AND J. A. JONES CONSTRUCTION CO.,

/s/ WILLIAM C. ROBBINS.

Received July 26, 1949.

United States of America
Before the National Labor Relations Board

[Title of Cause.]

NOTICE OF HEARING

Oral argument previously scheduled for August 11, 1949, in the above-entitled proceeding having been postponed indefinitely by telegram dated August 5, 1949,

Please Take Notice that pursuant to authority vested in the National Labor Relations Board under the National Labor Relations Act, as amended,

(Public Law 101—80th Congress, 1st Session), a hearing will be held before the National Labor Relations Board on Monday, December 19, 1949, at 10:00 a.m. in the Hearing Room 2030, Federal Security Building, South, C Street between 3rd and 4th Streets, Southwest, Washington, D. C., for the purpose of oral argument in the above-entitled matter. Argument will be limited to one-half hour for each of the following parties:

Guy F. Atkinson Co., a corporation, J. A. Jones Construction Co., a corporation, d/b/a Guy F. Atkinson Co., and J. A. Jones Construction Co.

Chester R. Hewes.

International Union of Operating Engineers, Local 370, AFL.

General Counsel, National Labor Relations Board.

The following parties will be permitted to participate in the oral argument as amici curiae; their argument will be restricted however to the general problems of Board jurisdiction in the Building and Construction industry and problems relating thereto:

Building and Construction Trades Department, American Federation of Labor.

Associated General Contractors of America.

Gardiner Johnson, 111 Sutter Street, San Francisco 4, California.

Dr. John Dunlop, Harvard University, Department of Economics, Cambridge, Mass.

National Constructors Association, Davies, Hardy, Schenck & Sons, One Wall Street, New York 5, New York.

International Association of Machinists, Att.: M. S. Ryder, Esquire, Ninth and Mount Vernon Place, N.W. Washington 1, D. C.

Should any party or organization listed above decide not to appear, such party or organization should immediately notify the Board.

Dated, Washington, D. C., December 5, 1949.

By direction of the Board:

/s/ LOUIS R. BECKER,
Acting Executive Secretary.

Filed in Formal File.

United States of America
Before the National Labor Relations Board

Case No. 19-CA-28

In the Matter of

GUY F. ATKINSON CO., a Corporation, and J. A. JONES CONSTRUCTION CO., a Corporation, d/b/a GUY F. ATKINSON CO. AND J. A. JONES CONSTRUCTION CO.

and

CHESTER R. HEWES.

DECISION AND ORDER

On May 12, 1949, Trial Examiner Peter F. Ward issued his Intermediate Report in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices,[1] and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the copy of the Intermediate Report attached hereto. The Trial Examiner also found that the Respondent had not engaged in certain other alleged unfair labor practices, and recommended that those allegations of the complaint be dismissed.

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[1]The Trial Examiner found that the Respondent had violated Section 8(1) of the original Act and Section 8(a) (1) and (3) of the amended Act. Those provisions of Section 8(1) which the Trial Examiner found the Respondent had violated are continued in Section 8(a) (1) of the amended Act.

Thereafter, the Respondent filed exceptions and supplemental exceptions to the Intermediate Report; Local 370, International Union of Operating Engineers, A.F.L., filed exceptions and a brief in support of its exceptions; and Hewes, the charging party, filed a brief in support of the Intermediate Report. Thereafter, the Board permitted the Building and Construction Trades Department, A.F.L., and the Associated General Contractors to file briefs, as amici curiae, bearing on certain related matters, many of which are not decided here.

On the morning of December 19, 1949, the Board at Washington, D. C., heard oral argument in which certain of the above-named parties and the General Counsel participated. The latter's representative argued in support of the Intermediate Report.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the exceptions and briefs, the contentions advanced at oral argument, and the entire record in the case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner, with the following additions and modifications:

1. We find, as did the Trial Examiner, that the operations of the Respondent affect commerce, and that the policies of the Act will be effectuated by the exercise of our jurisdiction.

Although the briefs of the Respondent and the Operating Engineers point to the non-assertion of

jurisdiction over construction projects under the original Act, such abstention was an administrative choice rather than a legal necessity,[2] and does not stop our present exercise of jurisdiction.[3] Indeed, since 1947, under the amended Act, we have asserted jurisdiction over substantial construction projects, including this very project.[4] And in taking jurisdiction over this project, we said:

> We have previously indicated our disposition to assume jurisdiction over concerns engaged in construction projects similar to the one in the case before us. Moreover, the magnitude of the operations leaves little doubt as to their substantial effect upon interstate commerce.

We, therefore, cannot accept the contentions addressed to the Board's jurisdiction or its exercise thereof.

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[2]Ozark Dam Constructors, 77 NLRB 1136.

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[3]N.L.R.B. v. Baltimore Transit Company, 140 F. 2d 51 (C.A. 4) cert. den. 321 U. S. 795.

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[4]Ozark Dam Constructors, supra; Daniel Hamm Drayage Company, Inc., 84 NLRB No. 56; Guy F. Atkinson Company and J. A. Jones Construction Company, 84 NLRB No. 12; Starrett Brothers and Eken, Inc., 77 NLRB 275. In another case involving this project (83 NLRB No. 142) the issue of jurisdiction was not raised.

The Respondent's further contention, that jurisdiction should not be asserted here because the product of the Hanford atomic energy works is at all times the property of an instrumentality of the Government and never enters into commerce, is without merit. Monsanto Chemical Company, 76 NLRB 767.

2. Like the Trial Examiner, we must find that the closed-shop contract of August 16, 1947, between the Respondent and the Operating Engineers[5] is not a valid defense to the discharge of Chester R. Hewes[6] on February 19, 1948.

The contract in question was entered into on August 16, 1947, for a 1-year term. As this date fell between the enactment date and the effective date of the amended Act, we must, under Section 102 of that amended Act,[7] determine its availability as a

[5]The Operating Engineers was one of the signatory unions to this contract which included numerous unions affiliated with the Building and Construction Trades Department, A.F.L.

[6]The Respondent and the Operating Engineers except to the Trial Examiner's finding that several other employees had been discharged pursuant to this contract. The exceptions are well taken, as this finding is unsupported by the record. However, our rejection of this finding has no impact upon the issues presented herein.

[7]Section 102, insofar as here applicable, provides: "* * * the provisions of Section 8(a) (3) and Section 8(b) (2) of the National Labor Relations Act as amended by this title shall not make an unfair labor practice the performance of any obligtaion under a collective-bargaining agreement entered into prior to the date of enactment of this Act, or (in the case of an agreement for a period of not more than one year) entered into on or after such date of enactment, but prior to the effective date of this title, if the performance of such obligation would not have constituted an unfair labor practice under Section 8(3) of the National Labor Relations Act prior to the effective date of this title, unless such agreement was renewed or extended subsequent thereto.

substantive defense under the original act.[8] Our decision in this case, therefore, does not turn upon, or construe, the substantive terms of the present statute.

The proviso to Section 8(3) of that 1935 statute states, in relevant part:

> "* * * nothing in this Act * * * shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this Act as an unfair labor practice) to require as a condition of employment, membership therein, if such labor organization is the representative of the employees as provided in Section 9(a), in the appropriate collective bargaining unit covered by such agreement when made.

Pertinent to the issue here, therefore, is whether the contracting union was the statutory representative of the employees in an appropriate unit when the agreement was made. On all the facts, we find, as did the Trial Examiner, that it was not.

On August 16, 1947, the project, which was known to be a very extensive one, was in its early stages. There were at that time 125 manual employees, in-

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[8]Daniel Hamm Drayage Company, Inc., 84 NLRB No. 56; Chicago Freight Car & Parts Co., 83 NLRB No. 167.

No issue is, or could be raised here because the August, 1947, contract was executed without the conduct of a union shop election under Section 9(e) of the amended Act.

cluding 10 operating engineers. In contrast, as of December 31, 1947, the work force had grown to 5,400 manual employees, of whom 740 were operating engineers. It is thus clear, without considering further increments thereafter[9] and without attempting to determine the scope of an appropriate unit, that in virtually all categories, including that of the operating engineers, the work force at the time the contract was signed was not at all representative of that shortly to be employed. Under these circumstances, the union could not have been, as required by the proviso to Section 8 (3), the representative of the employees in an appropriate unit.

It is contended, however, that these principles are not applicable, because the manner in which the contract here was executed was and is customary in the construction industry. We have previously held that we cannot assume the power to give effect to a custom which is contrary to the statute.[10] In writing the proviso to Section 8 (3), and even its counterpart in the amended Act, Congress made no exception based upon custom in any industry. We must, therefore, apply the Act as written, without engrafting administrative exceptions upon it.[11]

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[9]In May, 1948, a peak of 9,900 manual employees was reached, and at no time during 1948 did employment drop below 8,400 manual employees.

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[10]National Maritime Union of America, 78 NLRB 971.

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[11]Cf. Colgate-Palmotive-Peet Co. v. N.L.R.B., 338 U. S. 355.

The Respondent and the Operating Engineers

Nor does the fact that this Respondent may well have acted in good faith or in the presence of what it considered a national emergency constitute a sufficient legal defense. As the Trial Examiner found, the Congress made no exceptions for either good faith or economic exigencies which may seem to an employer to justify his violations[12]

Equally without effective merit is the Respondent's contention that, had it not entered into the contract, it would have been subject to a charge of refusal to bargain. The very reasons for which we are holding the union not to have been the representative of the employees would have constituted a valid defense to such a charge.

We therefore find, as we necessarily have found with respect to other contracts executed under similar circumstances,[13] that the contract relied on as a defense to the discharge of Chester R. Hewes does not fall within the protection of the proviso

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contend that the Board is precluded from questioning the contract in view of the limitation to the Board's 1948 appropriation. We agree with the Trial Examiner that, the rider having expired, the limitation is not here applicable. Kinner Motors, 57 NLRB 622; cf. N.L.R.B. v. Thompson Products, 141 F. 2d 794 (C. A. 9). We therefore find it unnecessary to pass upon the various other bases on which the Trial Examiner found this contention to be without merit.

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[12]N.L.R.B. v. Star Publishing Co., 79 F. 2d 465 (C. A. 9).

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[13]Daniel Hamm Drayage Company, Inc., supra; Chicago Freight Car & Parts Co., supra.

to Section 8 (3) of the original Act.[14] The discharge pursuant to that contract was consequently violative of Section 8 (a) (3) and 8 (a) (1) of the amended Act,[15] as the Trial Examiner found.

3. We find it unnecessary, in the absence of exceptions, to pass upon the Trial Examiner's dismissal of the 8 (2) allegations of the complaint.

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[14]The complaint alleged, and the Trial Examiner found, the signing of the contract to be an independent violation of Section 8(1). However, as the contract was signed on August 16, 1947, and the charge was not filed until February 27, 1948, more than 6 months after the effective date of the Act, Section 10(b) precludes such a finding. Itasca Cotton Manufacturing Company, 79 NLRB 1442; Cathey Lumber Company, 86 NLRB No. 30. We shall, therefore, without disturbing the Trial Examiner's other 8(a) (1) findings, dismiss this allegation of the complaint.

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[15]The fact that we did not choose to exercise jurisdiction over the construction industry under the original Act, carries no implication that had we asserted jurisdiction, we would not then have reached the same conclusion on an identical set of facts.

We find no merit in the contention that Hewes' application to membership in the Operating Engineers was a contract by which he agreed to the discharge in advance. Moreover, the Respondent did not discharge Hewes pursuant to his contract with the Operating Engineers, but in accordance with the Respondent's contract with the Operating Engineers.

Nor do we believe that it was Hewes' duty to seek reinstatement after August 10, 1948, when the closed-shop contract was no longer in effect. It is the employer's duty to remedy a discriminatory discharge by offering reinstatement. E. C. Brown Company, 81 NLRB No. 22.

Order

Upon the entire record in the case and pursuant to Section 10 (c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Guy F. Atkinson Co. and J. A. Jones Construction Co., and its officers, successors, and assigns shall:

1. Cease and desist from:

(a) Recognizing International Union of Operating Engineers, Local 370, A.F.L., or any successor thereto, as the representative of any of its employees for the purposes of dealing with the Respondent concerning grievances, labor disputes, wages, rates of pay, hours of employment, or other conditions of employment unless and until said organization shall have been certified by the National Labor Relations Board;

(b) Performing or giving effect to its contract of August 16, 1947, with International Union of Operating Engineers, Local 370, A.F.L., or to any modification, extension, supplement, or renewal thereof, or to any other contract, agreement, or understanding entered into with said organization relating to grievances, labor disputes, wages, rates of pay, hours of employment, or other conditions of employment, unless and until said organization shall have been certified by the National Labor Relations Board; excepting, however, that in no event shall this be construed as waiving any provisions of Sections 8 and 9 of the Act, as amended;

(c) Discouraging membership in International

Association of Machinists or in any other labor organization of its employees or encouraging membership in International Union of Operating Engineers, Local 370, A.F.L., by discharging or refusing to reinstate any of its employees, or in any other manner discriminating in regard to their hire and tenure of employment or any term or condition of their employment;

(d) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form labor organizations, to join or assist International Association of Machinists, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8 (a) (3) of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Offer to Chester R. Hewes immediate and full reinstatement to his former or substantially equivalent position, without prejudice to his seniority and other rights and privileges;

(b) Make whole Chester R. Hewes for any loss of pay he may have suffered as a result of the Re-

spondent's discrimination against him by payment to him of a sum of money equal to the amount he normally would have earned as wages from the date of his discharge to the date of the Respondent's offer of reinstatement, less his net earnings during said period;

(c) Post at its plant in Richland, Washington, copies of the notice attached hereto, marked Appendix A.[16] Copies of said notice, to be furnished by the Regional Director for the Nineteenth Region, shall, after being duly signed by the Respondent's representative, be posted by the Respondent immediately upon receipt thereof and maintained by it for sixty (60) consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material;

(d) Notify the Regional Director for the Nineteenth Region in writing, within ten (10) days from the date of this Order, what steps the Respondent has taken to comply herewith.

And It Is Further Ordered that the complaint be, and it hereby is, dismissed insofar as it alleges that by executing the August 16, 1947, agreement,

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[16]In the event this Order is enforced by a decree of a United States Court of Appeals, there shall be inserted in the Notice, before the words "A Decision and Order," the words "A Decree of the United States Court of Appeals Enforcing."

the Respondent violated Section 8 (1) of the Act, and that the Respondent violated Section 8 (2) and Section 8 (a) (2) of the amended Act.

Signed at Washington, D. C., this 8th day of June, 1950.

PAUL M. HERZOG,
Chairman.

JOHN M. HOUSTON,
Member.

JAMES J. REYNOLDS, JR.,
Member.

ABE MURDOCK,
Member.

[Seal] NATIONAL LABOR RELATIONS BOARD.

Appendix A

Notice to All Employees
Pursuant to a Decision and Order

of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby notify our employees that:

We Will withdraw and withhold all recognition from International Union of Operating Engineers, Local 370, A. F. L., as the representative of any of our employees at our Richland, Washington, plant, for the purposes of dealing with us concerning grievances, labor disputes, wages, rates of pay, hours of employment, or other conditions of em-

ployment, unless and until said organization shall have been certified by the Board as the representative of such employees.

We Will cease performing or giving effect to our contract of August 16, 1947, with International Union of Operating Engineers, Local 370, A.F.L., covering employees at our Richland, Washington, plant, or to any modification extension, supplement, or renewal thereof, or to any other agreement, contract, or understanding entered into with said organization relating to grievances, labor disputes, wages, rates of pay, hours of employment, or other conditions of employment, unless and until said organization shall have been certified by the Board, excepting, however, that in no event shall this be construed as waiving any provisions of Sections 8 and 9 of the Act as amended.

We Will Not in any like or related matter interfere with, restrain, or coerce our employees in the exercise of their right to self-organization, to form labor organizations, to join or assist International Association of Machinists, or any other labor organization, to bargain collectively through representatives of their own choosing, to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all of such activities, except to the extent that such right be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8 (a) (3) of the Act.

We Will offer to Chester R. Hewes immediate

and full reinstatement to his former or substantially equivalent position, without prejudice to any seniority or other rights and privileges previously enjoyed; and we will make him whole for any loss of pay suffered as a result of the discrimination against him.

GUY F. ATKINSON, and

J. A. JONES CONSTRUCTION CO.,

(Employer.)

By .....

(Representative.) (Title.)

Dated .....

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

Filed in informal file.

Before the National Labor Relations Board
Division of Trial Examiners

[Title of cause.]

PATRICK H. WALKER,
For the General Counsel.

WILLIAM C. ROBBINS,
For the Respondent.

E. J. EAGEN,
For Hewes.

L. PRESLEY GILL, For the Engineers.

Before Ward: Trial Examiner.

INTERMEDIATE REPORT

Statement of the Case

Upon a charge duly filed February 27, 1948, by Chester R. Hewes, herein called Hewes, the General Counsel for the National Labor Relations Board[1] by the Regional Director for the Nineteenth Region, (Seattle, Washington), issued a complaint dated September 28, 1948, against Guy F. Atkinson Company, a corporation, J. A. Jones Construction Co. a corporation, doing business as Guy F. Atkinson Co. and J. A. Jones Construction Co., Richland, Washington, herein called the Respondent, alleging that the Respondent had engaged and was engaging

[1]The General Counsel and his representative at the hearing are referred to as the General Counsel and the National Labor Relations Board is referred to as the Board.

in unfair labor practices affecting commerce within the meaning of Section 8 (1) and (2) and Section 2 (6) and (7) of the Act, prior to amendment, herein called the Act, and Section 8 (a) (1), (2), and (3) and Section 2 (6) and (7) of the Act as amended, herein called the Amended Act. Copies of the complaint, with charge attached and notice of hearing thereon, were duly served upon the Respondent, Hewes, and International Union of Operating Engineers, Local 370, AFL, Party to the contract, herein called the Engineers.

With respect to the unfair labor practices, the complaint alleged in substance that: (1) on or about August 16, 1947, Respondent entered into an agreement with the Building and Construction Trades Department of the AFL, of which the Engineers was a signatory union, which agreement as a condition of employment at its Richland operations, required its employees, as a condition of continued employment, to become and remain members of the Engineers; and that at the date of the execution of said agreement the Engineers did not represent a majority of the employees at Respondent's Richland operations within an appropriate unit, nor in any unit of Respondent's employees at such operations that was appropriate for collective bargaining; the agreement above referred to was executed and made effective by Respondent at a time when the International Association of Machinists, herein called IAM, had given to Respondent actual notice of its claim to represent employees in an appropriate unit composed of machinists; (2) on or about February 19, 1948, the Respondent discharged

Hewes, then employed at its Richland, Washington operations, and since said date has failed and refused and continues to refuse to reinstate said Hewes to his former or substantially equivalent position for the reason that he joined or assisted the IAM, or engaged in other concerted activities for the purposes of collective bargaining or other mutual aid and protection or for the reason that he did not become a member in good standing of the Engineers; (3) since on or about November 1, 1947, Respondent has solicited its employees to become and remain members of the Engineers; and (4) by the acts described above, the Respondent interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act and in Section 7 of the Amended Act.

On or about October 13, 1948, the Respondent filed its answer, wherein it admitted certain allegations in the complaint, but denied the commission of any unfair labor practices and for its Affirmative Defenses Respondent alleged in substance that it would not effectuate the purposes of the N.L.R.A. as amended, for the Board to assume jurisdiction over Respondent in its said activities; that the work performed by Respondent is known as building trades construction work, which by custom immemorial in the industry, persons and firms desiring said work to be done require the execution of contracts well in advance of the commencement of the work; that prospective contractors, in accordance with said custom, cannot ascertain what the cost of

labor will be nor the availability of labor, without executing a labor contract with the Union able to supply the requisite skilled mechanics in the numbers and at the times required; that Letter Subcontract No. G-133, which formed the basis for the Respondent's undertaking such work, was entered into effective as the July 25, 1947, in contemplation of the Labor Agreement of August 16, 1947, as the Engineers had the only available pool of workmen required for the work to be done under said subcontract; that the Engineers and other labor signatories to the said labor agreement operated only under so-called "closed-shop" conditions; and because of said customs, and the control over all the manpower by the Engineers and other signatory labor Unions, the Respondent was required to execute the union security provisions of said agreement and to comply therewith.

On or about October 15, 1948, the Engineers, filed its answer to the complaint wherein it admitted some of the allegations therein and denied the commission of any unfair labor practices by the Respondent. The Engineers further alleged in substance, that Hewes, upon good and sufficient consideration by contract, agreed to become and remain a member of the Engineers; that relying upon said contract of Hewes, the Engineers did dispatch Hewes to the job with the Respondent; that Hewes did not comply with any of the conditions of the contract and was therefore removed from the job. The Engineers' answer iterates in the main the Affirmative Defenses set out by the Respondent.

Pursuant to notice, a hearing was held at Yakima, Washington, on November 4 and 5, 1948, before Peter F. Ward, the Trial Examiner duly designated by the Chief Trial Examiner. The General Counsel, the Respondent, Hewes, the IAM, and the Engineers were represented by counsel. All participated in the hearing and were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing upon the issues, and at the close of the hearing, the parties were offered an opportunity to argue orally before the undersigned, but such opportunity was waived. The parties were advised that they might file briefs and/or proposed findings of fact and conclusions of law with the undersigned and briefs and proposed findings were filed by Hewes.[2] The Respondent and the Engineers filed briefs only.

At the close of the hearing the undersigned reserved ruling on the Engineers' motion to strike and dismiss as is set forth in Engineers' Exhibits 2-A and 2-B; and also reserved ruling on the motion of counsel for Respondent to strike certain testimony having to do with the "jurisdictional aspects" certain issues involved herein; and the General Counsel's motion to strike certain testimony relating to matters concerning representation proceedings and union security proceedings, and now rules that all said motions to strike be denied.

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[2]The undersigned has adopted Hewes' proposed findings, No. 1, in part, and Nos. 3 and 5 in full; and the "Proposed Order" to the extent set forth in the Recommendations, below.

Upon the entire record in the case and from his observation of the witnesses, the undersigned makes the following:

Findings of Fact

I.

The Business of the Respondent

Guy F. Atkinson Co. and J. A. Jones Construction Co. a joint venture[3] organized for the purpose of accepting the terms of Letter Subcontract No. G-133, an agreement made July 25, 1947, with General Electric Company, as prime contractor, on behalf of the U. S. Atomic Energy Commission for the construction of buildings, facilities, and other items of work in connection with Hanford Engineering Works Project. Respondent's principal office and place of business is located at Richland, Washington, where in the course and conduct of its business it causes and continuously has caused materials consisting of cement, lumber, reinforcing steel, glass, paint, hardware, tools, equipment and other supplies of approximately $20,000,000 in value for the period from July 29, 1947, to April 6, 1948, to be purchased and delivered to it at Richland, Washington. Of such materials, approximately $2,500,000 in value has been purchased, delivered, and transported in interstate commerce from and

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[3]A "joint venture" is normally created for the purpose of performing large type Government contracts where single firms or corporations lack sufficient resources to satisfy the Government of their ability to undertake and complete large construction jobs, and are generally dissolved at the end of a given contract.

through States of the United States other than the State of Washington. Approximately $9,500,000 in value of such materials were produced, fabricated and originated from points outside the State of Washington and thereafter were trans-shipped to Respondent from points within the State of Washington.[4] The undersigned finds that the Respondent is engaged in commerce within the meaning of the Act and of the Amended Act.

II.

The Labor Organizations Involved

International Union of Operating Engineers, Local 370, AFL, and International Association of Machinists, are labor organizations within the meaning of Section 2 (5) of the Act and of the Amended Act.

III.

The Unfair Labor Practices

A. The discriminatory discharge of Chester R. Hewes

1. Events antedating the discharge:

Prior to July 25, 1947, the U. S. Atomic Energy

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[4]These findings are based upon a stipulation of the parties. Notwithstanding it joined in such stipulation, the Engineers contend that the Respondent's operations as above stipulated do not affect commerce and the Respondent contends in substance, that inasmuch as its operations consist of building construction, the Board should not exercise or assert jurisdiction. Neither contention has merit. Respondent's contention is further discussed below in connection with its defenses.

Commission, herein called the Commission, entered into a contract with General Electric Company, herein called General Electric, as prime contractor, for the construction of buildings, facilities, and other items of work in connection with the Commission's Hanford Engineering Works Project,[5] herein called the Project, located at, and in the vicinity of Richland, Washington.

Under date of July 25, 1947, General Electric, as prime contractor, and the Respondent as subcontractor, pursuant to the terms of "Letter Subcontract No. G-133,"[6] sometimes referred to in the record as the "letter order," entered into an agreement with the Respondent requiring the latter to proceed immediately in preparing to perform such construction work. While it appears that such "letter order" contained no plans or specifications, the Respondent was informed that a part of the work had to do with residential construction to house future employees and the construction of a construction camp area. Such letter order referred

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[5]Other than that such Project has to do with security measures undertaken on behalf of the Government of the United States, the record is silent as to the Project's functions.

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[6]This is a form used by governmental agencies in emergencies in order that contractors or subcontractors may make preliminary preparations for the procurement of manpower and materials and usually antedates receipt of plans, specifications, or blueprints. Such Letter in its nature is a "stop-gap" agreement which is to be followed by a normal agreement at the earliest possible date.

to the sum of $8,000,000 as an estimate of the cost of construction.

As soon as the Respondent had employed its initial non-manual staff, it met with the Building Trades Department of the American Federation of Labor at Spokane, Washington on August 14, 15, and 16, 1947. On August 16, 1947, the Respondent as Employer and the Engineers and some 14 other affiliates of the Building and Construction Trades Department of the American Federation of Labor, as the Union executed a closed-shop agreement, effective as of August 1, 1947, and to remain in effect until August 1, 1948, and from year to year unless terminated in the manner therein provided.

The contract provided, inter alia:

> Art. III, Sec. 1. This Agreement shall cover all employees who are members of the signatory unions who are performing work within the recognized jurisdiction of such unions as the same is defined by the Building Trades Department of American Federation of Labor, for which employees the Union is recognized as the sole and exclusive bargaining agent.
>
> Art. IV Sec. 2. It is understood and agreed that the Employer shall retain in employment only members in good standing of Union or Those Who have signified their intention of becoming members through the regularly established procedure of the Union.
>
> Sec. 3. While the Union assumes all responsibility for the continued membership of its members and the collection of membership

> dues, it reserves the right to discipline its members and/or those employees who have filed applications to become members; and the Employer agrees to, upon written notice from the Union, release from employment any employees who fail to maintain membership in good standing and/or any employee who defaults in his obligations to the Union. It is understood that the removal of and replacement of such employees shall not interfere with the operations of the job.

It is undisputed that at the date of the execution of the collective bargaining contract on August 16, 1947, the Engineers did not represent a majority of employees of the Respondent in any unit, appropriate or otherwise.[7]

On or about August 28, 1947, the Respondent caused a copy of the August 16, 1947, contract to be posted on its bulletin board at the entrance to its Headquarters and Administration Building, where such copy of the contract remained posted until on or about January 1, 1948.[8]

During the latter part of October, 1947, Chester

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[7]In its position in this connection, the Respondent makes no claim that the Engineers represented any employees on August 16, 1947, but contends that the contract was valid and binding on all signatory parties for reasons which are discussed in detail below.

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[8]Such posting was caused to be made in an attempt to comply with the provisions of the "rider" made a part of the National Labor Relations Board

R. Hewes, Complainant herein, went to the Respondent's personnel office and applied for a job as a Machinist and asked if he could go to work and work on his Machinist "card." He was informed that it was "a closed job . . . a closed shop," and was referred to the Operating Engineers at Pasco (Washington). Hewes went to Pasco and contacted Ray Clarke, business representative for the Engineers, and asked Clarke if "they" needed any Machinists. Clarke took Hewes into the office and asked him if he were a Machinists, whereupon Hewes presented his Machinist dues book for Clarke's information. Clarke then stated that Hewes would have to turn in his Machinist book and join the Engineers to go on the job. Hewes refused to turn in his book and was told by Clarke that he would be given credit for $60 on his dues amounting to $100 if he turned in his IAM book and would then have to pay but $40 of the remaining amount of dues which would entitle him to membership in the Engineers.

Hewes refused to turn in his book and left Clarke's office. He later returned to Clarke's office and a further discussion was had in connection with his Machinist dues book which he again refused to turn over to Clarke. Hewes then asked if he could not be permitted to work as a Machinist on a

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Appropriations Act, 1948. The effect of such posting is discussed and considered below in connection with the contentions of the Respondent and the Engineers to the effect that the contract could not be questioned as to its validity, since it had been posted more than 3 months before the charge was filed herein.

"permit," to this Clarke replied, "I will go you one better. You keep your book and we will charge $40 and you go to work." Thereafter Clarke issued Hewes an Introduction Card assigning him to work with the Respondent as a "Machinist (Precision)."[9]

Hewes went to work on or about November 4, 1947, and was assigned to work in a machine shop in the locale referred to as "3,000 Area." The record discloses that during his employment he was continuously employed performing work ordinarily performed by Machinists, as distinguished from the work performed by Operating Engineers.

2. The discharge—

Under date of February 16, 1948, the Engineers wrote Respondent's labor relations manager as follows:

February 16, 1948

Mr. D. Russell Gochnour, Labor Relations Manager
Guy F. Atkinson Co. and J. A. Jones Construction Co.
Richland, Washington

Dear Mr. Gochnour:

I am requesting the removal of Chester R. Hewes, machine tool operator, from the Hanford Project.

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[9]On the original of such introduction card, introduced in evidence, the word "Machinist" had been obliterated. On the duplicate of such card the word "Machinist" still remained. Hewes credibly testified, and the undersigned finds that when the card was turned in to the Respondent, the word "Machinist" was on it.

This man is one of the ring leaders who is trying to sabotage the efforts of the Operating Engineers to supply competent men for your job. This man has absolutely failed in his financial obligation to this Local Union.

The following is a list of other machine tool men who have also failed to meet their obligation and I am requesting that these men be notified at once to pay their obligation to this office not later than this coming Thursday evening, February 19th. Also at the same time, I want them to be notified that if they do not meet their obligation, I will demand their removal from the project.

Claire Abbott	Phillip R. Helwig
John D. Beach	Herbert M. Kinsey
Ben Bishop	Walter A. Mackay
Myron A. Brewer	Archie T. Rollo
O. E. Burns	Ralph E. Rugg
Robert W. Davis	Steve F. Susick
LeRoy A. Dyer	Lyle E. Triplett
Martin R. Griffin	Gordon E. Wood
Charles L. Hall	Gage M. West

This is quite a formidable list; however, my steward reports that he is of the opinion that once these people are notified, they will likely meet their obligations and remain in good standing.

Thanking you for your cooperation and with kind personal regards, I am,

Very truly yours,

/s/ RAY CLARKE,

/t/ RAY CLARKE,

Local 370,

Pasco Branch Office.

The letter above referred to was called to the attension of James J. Molthan employed under the title of Manager of the Contract and Claims Section of Respondent and who also acted as administrative assistant to the general manager. In this connection Molthan testified in part:

> The letter called for us to go and contact various individuals allegedly members of the Operating Engineers, with a view of telling them that if they didn't pay their dues, we were going to discharge them. We were under no contractual obligation to do that on behalf of the various Unions with whom we were dealing at that time.

The above-quoted letter was then withdrawn by the Engineers and a second letter applicable to Hewes only was sent to the Respondent's labor relations manager. The letter reads:

February 16, 1948.

Mr. D. Russell Gochnour, Labor Relations Manager,
Guy F. Atkinson Co. and J. A. Jones Construction Co.,
Richland, Washington.

Dear Mr. Gouchnour:

I am requesting the removal of Chester R. Hewes, machine tool operator, from the Hanford Project. This man has absolutely failed in his financial obligation to this Local Union.

Thanking you for your cooperation and with kind personal regards, I am

Very truly yours,

/s/ RAY CLARKE,
Representative, Local 370,
Pasco, Branch Office.[10]

After the receipt of the foregoing letter Molthan made an investigation and found that Hewes had applied for membership in Local 370 (Engineers); thereafter had defaulted in his financial obligations; and Moulthan testified that he concluded that under the Respondent's contract with the Engineers the Respondent was required to and did discharge Hewes from the pay roll.

On February 18, 1948, Respondent's timekeeper handed Hewes a "lay-off card"; while the card handed to Hewes did not state the reason for the law-off, a photostatic copy of the original of such card in evidence states the reason as "Union request."

The lay-off card contained the following question, "Do you want this workman back again?" after which appeared the word, "Yes" followed by a blank line and under the word yes appeared the word "No" followed by a blank line. Neither alternative was checked.

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[10]The record discloses that other individuals named in the first letter sent under date of February 16 were named separately in letters similar to the one sent in connection with Hewes; and like Hewes all were discharged at the request of the Engineers.

Issues; Contentions; Conclusions

The Respondent bases its defense, in substance, on the following points:

(1) That the contract of August 16, 1947, is a typical Building Trades Construction contract of the type over which the Board has not historically asserted or exercised general jurisdiction; and under the circumstances disclosed by the record herein, the Board should decline to exercise its jurisdiction; (2) that the instant proceedings are barred by the "rider" contained in the National Labor Relations Board Appropriation Act, 1948;[11] (3) that pursuant to the terms of the August 16, 1947, contract the Respondent was required to discharge workmen who failed to meet their obligations to Unions signatory to the contract; (4) that inasmuch as the Hanford Works Project was of such vital importance to the National security it was a matter of great urgency that the work be commenced at the earliest possible moment; that at the direction of the Atomic Energy Commission, given on behalf of the Government of the United States, the Respondent undertook the performance of the construction work required by the Project; that in so doing the Respondent found it necessary to solicit manual personnel from the Building and Construction Trades Department of the American Federation of Labor, as the source of the only available labor pool sufficient to fill the job requirements; that in order to receive the cooperation of the American Federation of Labor

[11]Public Law 165, 80th Cong., Chap. 210, 1st Sess.

Building Trades Union, it was absolutely necessary to give such unions the exclusive right to select all such employees; and that in view of all of the foregoing facts the complaint should be dismissed; and (5) that should the foregoing grounds, either jointly or severally, be insufficient to constitute a defense, the Respondent relies upon the representations of its prime contractor, General Electric Company and the U. S. Atomic Energy Commission, that the requirement for immediate performance of the work was urgent and vital and affected with extreme National importance; and since the Respondent has discharged its obligations to the satisfaction of its prime contractor, and if it has thereby violated any of the provisions of the Act or the Act as amended, the good faith of the Respondent constitutes a defense.

As to point (1), while the Respondent does not affirmatively contend that the Board lacks jurisdiction over Building Trades Construction, it implies that the Board has not heretofore asserted such jurisdiction and should, in effect, feel itself estopped to do so in the instant matter. Board decisions have held that the Board has such jurisdiction and has exercised it. In re Brown & Root, Inc. et al.,[12] wherein a group of corporations and firms doing business as a joint venture under the name of Ozark Dam Constructors, who had engaged to build a dam and presumably other facilities as a part of a flood control and electrical power development

[12]77 N.L.R.B. 1136.

project of the War Department, contended that the joint venture was not engaged in commerce within the meaning of the Act, and based its contention on the fact that the Board had in the past refused to exercise jurisdiction in construction cases. In this connection the Board said:

> . . . Aside from the fact that construction of a dam for purposes of flood control and generation of electric power has a greater impact upon commerce than construction of buildings, we have repeatedly stated that our jurisdiction extends over construction projects if their interruption would affect interstate commerce, and that our abstention from exercising our jurisdiction in construction cases was a matter of administrative choice and not legal necessity.

In this case the Board further stated in part:

> Inasmuch as stoppage work on the Bull Shoals Dam would affect shipments of several million dollars' worth of materials into the State of Arkansas from other states, and would delay the production of electricity which will probably be sold in interstate, we find, contrary to the contentions of the Employer, that it is engaged in commerce within the meaning of the National Labor Relations Act and that the purposes of the Act will best be served if we assume jurisdiction in this case. (Citing cases.)

As found in Section I above the Respondent is engaged in interstate commerce within the meaning

of the Act. The Board has and should assume jurisdiction herein.

Point (1) is without merit.

As to point (2),[13] the "rider" in question reads in part as follows:

> No part of the funds appropriated in this title shall be used in any way in connection with a complaint case arising over an agreement, . . . between an employer and a labor organization which represents a majority of his employees in their appropriate bargaining unit, which has been in existence for 3 months or longer without complaint being filed by an employee or employees of such plant: Provided, That, hereafter, notice of such agreement . . . shall have been posted in the plant affected for such period of 3 months, said notice containing information as to the location at an accessible place of such agreement where said agreement shall be opened for inspection by any interested persons: . . .

It will be noted that the "rider" (a) presupposes an agreement between an employer and a labor organization which represents a majority of his employees in their appropriate bargaining unit,— and (b) that "notice of such agreement . . . shall have been posted in the plant affected . . . said notice containing information as to the location at an accessible place of such agreement where said

[13]The Engineers also contend that such "rider" is a bar to the instant proceedings.

agreement shall be opened for inspection by interested persons . . . " (Underscoring supplied.)

From the foregoing it would appear necessary to determine first, whether the Engineers represented a majority of the Respondent's employees in an appropriate unit as of the date of the execution of the contract on August 16, 1947,[14] and second, if it did so represent such majority whether notice of such agreement was properly and timely posted.

As to the first point for determination it is clear that on August 16, 1947, when the contract was executed, neither the Engineers or other signatory Unions represented any of the Respondent's employees in an appropriate unit.

In this connection, Molthan, with reference to the negotiation and signing of the August 16, 1947, contract, testified in part:

> We did not ask for any of the Unions that signed this agreement to make a showing that they, in fact, represented persons employed by Atkinson and Jones because actually we had no employees. It is customary in the construc-

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[14]The limitation on the use of Board's funds for the fiscal year ending June 30, 1947, did not contain the qualifications that the labor organizations be one "which represents a majority of his [employer's] employees in their appropriate unit" and thus indicates that Congress, by use of such language in the "rider" to the Appropriations Act of 1948, intended to protect only contracts wherein the labor organizations actually represented a majority of an Employer's employees in an appropriate unit at the date of the execution of a collective bargaining agreement.

> tion industry to get your working agreements settled, your wage rates settled through the area agreement, if possible, or set up a special job agreement, as we were required to do at Hanford, and then rely upon the unions signatory to man the job . . .

Assuming arguendo that the facts found next above are insufficient to support a finding that the limitation "rider" of the Board's Appropriations Act of 1948 is not a bar to the proceedings herein, was a sufficient notice of such agreement properly and timely posted?

The only evidence in the record pertaining to posting is the affidavit of Respondent's "Controller" that he caused a mimeographed copy of the August 16, 1947, agreement to be placed upon the bulletin board on or about August 28, 1947 (or some 12 days after the execution of the contract), and that it was his "recollection" that said agreement[15] remain posted on such bulletin board until on or about January 1, 1948.

The "rider" provides inter alia that such notice shall have been posted in the plant affected for said period of 3 months and shall contain "information" as to the "location" at an "accessible place" where the agreement shall be "open for inspection by any interested person." (underscoring supplied)

Did the posting of the mimeographed copy above described comply with the requirements of the

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[15]A photostatic copy of the contract in evidence discloses that it was typewritten; consisted of seven pages, and was headed "Agreement" with the Sections typed in singled spaced lines.

"rider" with reference to "notice?" It is clear that no "Notice," as such, was posted. Assuming that the posting of a copy of the contract amounts to a constructive "posting," did such posting of a copy of the contract on a bulletin board constitute the giving of information of an "accessible place" where the agreement was "open for inspection by any interested person"? The record contains no description or dimensions of the bulletin board; does not disclose whether the contract was attached to the bulletin board in a manner making it possible for an interested person to inspect it page by page while it was attached to the board; or whether it was necessary to detach it in order to inspect it. On the basis of the foregoing and the record it is the opinion of the undersigned that the mere "posting" of a copy of the agreement on the bulletin board does not constitute the posting of "notice" as is required by the Appropriations Act of 1948.[16]

In any event it is clear that the agreement, when executed, was not one between "an employer and a labor organization which represents [represented] a majority of his employees in their appropriate unit," as required by the "rider" in question. Said "rider" is not a bar to the instant proceedings. It is so found.[17]

Point (2) is without merit.

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[16]See in re Hall Freight Lines, Inc., 65 N.L.R.B. 397.

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[17]These findings concerning the "rider" to Board's Appropriations Act of 1948, have been made on the

As to point (3), the Respondent contends that it was compelled to discharge Hewes pursuant to the terms of the August 16, 1947, contract. The record discloses without dispute that at the time of the execution of the contract on August 16, 1947, the Engineers did not represent any employees of the Respondent in an appropriate unit. The Proviso of Section 8 (3) of the Act prior to amendment, insofar as is material herein, reads as follows:

> Provided, That nothing in this act . . . shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this act as an unfair labor practice) to require as a condition of employment membership therein, if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective bargaining unit covered by such agreement when made.[18] (Underscoring supplied.)

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theory that the "rider" is still in force and effect insofar as the instant case is concerned; however, the Appropriations Act of 1948 expired on June 30, 1948, and prior to the issuance of the complaint herein. The National Labor Relations Board Appropriations Act, 1949, did not reenact the "rider" with which we are here concerned. Under similar conditions the Board has held that it is not barred from proceeding to hear cases following expiration of an Appropriations Act. See Kinner Motors, Inc., 57 N.L.R.B. 622.

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[18]The Proviso under Section 8 (a) (3) of the Amended Act is to the same effect insofar as it

The Board has long held that an illegal closed-shop contract cannot operate as a defense to discharges made pursuant to the terms of such contract. In the Lennox Shoe Company, Inc., case[19] the Board, after quoting the Proviso to Section 8 (3) of the Act, stated:

> Under this provision and in view of our findings under III, A, above, the contract here in question is clearly invalid. The B. & S. W. U. was not, on the date on which the contract was signed, the free choice of a majority of the respondent's employees and was a labor organization which had been assisted by unfair labor practices. The B. & S. W. U. therefore is within the proviso to Section 8 (3) of the Act quoted above, and the June 9, 1937, contract between it and the respondent is void and of no effect. Of course, this does not mean that the B. & S. W. U. may not hereafter negotiate a new contract with the respondent should it subsequently be certified by the Board as exclusive representative of the respondent's employees.
>
> Since the contract is void and of no effect, it cannot operate as a defense to the discharges of Hill and Coffin.

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requires the labor organization to be the representative of the employees is provided in Section 9 (a) in the appropriate collective bargaining unit covered by such agreement when made. (Underscoring supplied.)

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[19] 4 N.L.R.B. 272.

Citation of further decisions is deemed unnecessary.

Point (3) is without merit.

As to point (4), the record does indicate that the Hanford Works Project was of vital importance to the National security; that at the direction of the Atomic Energy Commission, and its prime contractor, General Electric Company, the Respondent promptly undertook the performance of the construction work required; and that the Respondent believed that it was necessary and advisable that it solicit manual personnel from the Building and Construction Trades Department of the American Federation of Labor as the source of the only available labor pool sufficient to fill the job requirements; and it is also clear that the Respondent believed that it was necessary to make a closed-shop contract with the American Federation of Labor Building Trades Unions in order to expedite the work.

The Respondent contended in substance and effect, that unless it entered into a closed-shop contract with the signatory Unions to the August 16, 1947, contract, it would have been necessary to spend large sums of money in the procurement of manpower. The Board and the courts have long and consistently held that economic exigency does not excuse violation of the Act. As found in the Star Publishing case,[20] the Court of Appeals for the Ninth Circuit stated:

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[20]97 F. 2d 465, 47-5 (C.A. 9).

> The Act prohibits unfair labor practices in all cases. It permits no immunity because an employer may think that the exigencies of the moment require infraction of the statute. In fact, nothing in the statute permits or justifies its violation by employers.[21]

Point (4) is without merit.

As to point (5), from the record the undersigned is convinced that the Respondent relied upon the representations of its prime contractor, General Electric Company and the Atomic Energy Commission, that it was necessary that the construction work required by the Hanford Engineering Works Project was urgent and vital and effected with extreme National importance; and that the Respondent has discharged its obligations to the satisfaction of its prime contractor; and while the record clearly indicates that the Respondent acted in good faith, such fact does not constitute a defense to the unfair labor practices herein found.

Point (5) is without merit.

Engineers' Contentions

In addition to joining generally in the contentions of the Respondent, counsel for the Engineers contends in substance (1) that the complaint should be dismissed for lack of service on Local 370 of a copy of the charges; and (2) that since Hewes had in effect waived his rights to any remedy under the

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[21]See also McQuay-Norris Manufacturing Company v. N.L.R.B., 116 F. 2d 748, 752.

Act or the Amended Act by agreeing to the discharge in a legal contract with the Engineers.

As to Engineers' contention (1) the record discloses that the charge herein was filed February 27, 1948; and was served on the Respondent by registered mail on March 4, 1948. Since the Engineers was not "the person against whom such charge is made," or named a Respondent in the instant proceedings, the provisions of Section 10 (b) of the Act does not require that the Engineers be served with a copy of the charge at any particular time or at all.

As to Engineers' contention (2), the record discloses that on October 27, 1947, Hewes signed an application for membership card in the Engineers whereby he agreed to join the Engineers; pay initiation fees and dues; and designate the Engineers as his exclusive bargaining agency. The Engineers contend, in effect, that Hewes' application for membership became a contract based upon a valid consideration, in which he waived any right to institute proceedings in any court of law or equity against the Engineers; and since he had failed to pay his initiation fee in the Engineers he was properly discharged by the Respondent at the request of the Engineers.

Inasmuch as Hewes, in order to be employed by the Respondent, was compelled to make application in the Engineers as the result of an illegal contract executed between the Respondent, the Engineers, and other unions the Engineers' contention is wholly without merit and is so found.

Conclusions

From the foregoing and the record it appears and the undersigned finds that the Respondent discharged Chester R. Hewes on February 19, 1948, upon the demand of the Engineers pursuant to the terms of an invalid contract and thereby discriminated in regard to his hire and tenure of employment thereby discouraging membership in the IAM and interfering with, restraining, and coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act and Section 7 of the Amended Act, in violation of Section 8 (1) of the Act and Section 8 (a) (1) and (3) of the Amended Act.

B. Interference, restraint, and coercion; the alleged violation of Section 8 (2) of the Act and Section 8 (a) (2) of the Amended Act

The complaint, in substance, alleges that in violation of Section 8 (2) of the Act, reenacted as Section 8 (a) (2) in the Amended Act, the Respondent (1) entered into the closed-shop agreement above described which required its employees to become and remain members of the Engineers; (2) that at the time of the execution of said contract the Engineers did not represent a majority of the Respondent's employees at its Richland operations in an appropriate unit or in any unit that was appropriate for collective bargaining; (3) that said contract was executed and made effective by Respondent at a time when the IAM had given to

Respondent actual notice of its claim to represent employees in an appropriate unit composed of employees who customarily and regularly performed work of Machinists; (4) that notwithstanding that during the time Hewes was employed by the Respondent he performed work regularly performed by Machinists and not type of work performed by Engineers or coming within the terms of such contract, Hewes was, pursuant to demand of the Engineers made on February 16, 1948, discharged on or about February 19, 1948; and (5) that since on or about November 1, 1947, Respondent has solicited its employees to become and remain members of the Engineers. The undersigned has found in Section III A, above, that the Respondent entered into a closed-shop contract with the Engineers, at a time when the Engineers did not represent any of Respondent's employees in any unit; that such contract required the employees to become and remain members of the Engineers; and that it discharged Hewes (and other employees not party to these proceedings) because he had failed to "remain in good standing" with the Engineers.

With reference to allegation that when the Respondent executed the closed-shop contract with the Engineers, the IAM had given the Respondent "actual notice of its claim" as representative of employees in an appropriate unit of Machinists, the record discloses that under date of August 11, 1947, James A. Duncan as respresentative of IAM wrote Ray H. Northcutt, vice president of Guy F. Atkinson Company, inquiring as to what the policy

of the latter company was to be in connection with the hiring of employees in the Machinists' category on the "Richland" and another project. Under date of September 15, 1947, Northcutt wrote Duncan explaining that the contract of August 16, 1947, had been negotiated with AFL Building Trades Unions, and stated inter alia that it was his understanding "that unions not so affiliated might execute separate agreements for this (Hanford) Project."

Subsequently the Respondent requested IAM to submit copy of its "Schedule A," which was delivered along with a copy of "Machinists' Standard Agreement." Insofar as the record discloses, the IAM contended that it represented the Machinists in the Buildings Trade; asked to be considered; and made no claim as representative of any of the Respondent's employees.[22] With reference to the allegation that Respondent "solicited" its employees to become and remain members of the Engineers, the record contains no evidence of "soliciting." The record does disclose, however, that when Hewes asked for employment as a "Machinist," he was told that it was "a closed job * * * a closed shop," and that he would have to see the Engineers. This he did and subsequently

[22]Counsel for Respondent, in his brief states:

> Inasmuch as the International Association of Machinists was not an affiliate of American Federation of Labor the cooperation of the American Federation of Labor Building Trades Department would not have been available if respondent had used International Association of Machinists on the job.

he (along with other employees) was discharged at the instigation of the Engineers.[23]

It has been found above that at the date of the execution of the August 16, 1947, contract the Engineers did not represent a majority of the employees of the Respondent in an appropriate unit; that following the execution of such contract as aforesaid, the Respondent required employees to become and remain members of the Engineers; and on or about February 18, 1948, the Respondent, at the request of the Engineers, discharged Chester R. Hewes and some 18 other employees (not parties to these proceedings) for non-payment of dues to the Engineers.

From the above and the record the undersigned is of the opinion that the Respondent's conduct herein falls short of domination or support within the meaning of Section 8 (2) of the Act and Section 8 (a) (2) of the Amended Act and that the Respondent did not dominate the Engineers or otherwise engage in conduct violative of that por-

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[23]In its first request, made on February 16, 1947, that Hewes et al. be discharged, the Engineers, referring to Hewes, stated: "This man is one of the ringleaders who is trying to sabotage the efforts of the Operating Engineers to supply competent men for your job." The undisputed testimony shows that the Respondent considered Hewes a competent and satisfactory worker. From all of which it may be inferred that Hewes was active in seeking members for the IAM, and that such activity was one of the reasons which caused the Engineers to seek his discharge.

tion of the Act or the Amended Act.[24] The undersigned finds, however, that, by the signing of the closed-shop contract as aforesaid; by requiring its employees to become and remain members of the Engineers, thereby enhancing the prestige of the Engineers; and by the discharge of Hewes and other employees on February 18, 1948, thereby enforcing its illegal recognition of the Engineers, the Respondent has interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act and Section 7 of the Amended Act, and thereby violated Section 8 (1) of the Act and Section 8 (a) (1) of the Amended Act.

In view of the foregoing, which discloses illegal assistance, it will be recommended that the Respondent withdraw and withhold recognition from the Engineers as representative of its employees and cease giving effect to its contract with the Engineers in the manner set forth in the Section entitled "The remedy" below.

IV.

The effect of the unfair labor practices upon commerce

The activities of the Respondent, set forth in Section III, above, occurring in connection with the operations of the Respondent described in Section I, above, have a close, intimate, and substantial

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[24]See In re Shenandoah-Dives Mining Company, 56 N.L.R.B. 715; Hershey Metal Products Company, 76 N.L.R.B. 695.

relation to trade, traffic, and commerce among the several States, and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V.

The remedy

Having found that the Respondent has engaged in certain unfair labor practices, it will be recommended that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

The undersigned has found that the Respondent discriminated in regard to the hire and tenure of employment of Chester R. Hewes. It will be recommended that the Respondent offer to said Hewes immediate and full reinstatement to his former or substantially equivalent position[25] without prejudice to his seniority or other rights and privileges, and make him whole for any loss of pay he may have suffered by reason of the Respondent's discrimination against him by payment to him of a sum of money equal to that which he would have normally earned as wages from the date of his discharge to

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[25]In accordance with the Board's consistent interpretation of the term, the expression "former or substantially equivalent position" is intended to mean "former position wherever possible and if such position is no longer in existence then to a substantially equivalent position." See Matter of The Chase National Bank of The New York City, San Juan, Puerto Rico Branch, 65 N.L.R.B. 827.

the date of the Respondent's offer of reinstatement, less his net earnings[26] during such period.

The undersigned has further found that the Respondent did not dominate the Engineers' violation of Section 8 (2) of the Act or Section 8 (a) (2) of the Amended Act. It has been found, however, that the Respondent illegally recognized the Engineers and thereafter discharged certain employees at the request of the Engineers and thereby enhanced the prestige of the Engineers.

In order to remove the effects of such illegal support to the Engineers and in order to insure to the employees full and free exercise of the rights guaranteed in Section 7 of the Act and of the Amended Act, it will be recommended that the Respondent withdraw and withhold recognition of the Engineers as the representative of any of its employees for the purpose of collective bargaining until such time as the Engineers may be certified as their representative by the Board. It will be further recommended that the Respondent cease giving effect to the above-described contract or to

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[26]By "net earnings" is meant earnings less expenses, such as for transportation, room, and board, incurred by an employee in connection with obtaining work and working elsewhere, which would not have been incurred but for this unlawful discrimination and the consequent necessity of his seeking employment elsewhere. Matter of Crossett Lumber Company, 8 N.L.R.B. 440. Monies received for work performed upon Federal, State, county, municipal, or other work-relief projects shall be considered earnings. Republic Steel Corporation v. N.L.R.B., 311 U.S. 7.

any other contract made with the Engineers prior to certification, without prejudice, however, to the assertion by the employees of any legal rights acquired thereunder. Nothing herein, however, shall be taken to require the Respondent to vary those wage, hour, and other substantive features of its relations with the employees themselves which the Respondent may have established in conformity with the contract as extended, renewed, modified, supplemented, or superseded.

Upon the basis of the above findings of fact and upon the entire record in the case, the undersigned makes the following:

Conclusions of Law

1. International Union of Operating Engineers, Local 370, AFL, and International Association of Machinists, are labor organizations within the meaning of Section 2 (5) of the Act and of the Amended Act.

2. By discriminating in regard to the hire and tenure of employment of Chester R. Hewes, thereby discouraging membership in International Association of Machinists, the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (1) of the Act, and Section 8 (a) (1) and (3) of the Amended Act.

3. By interfering with, restraining, and coercing its employees in the exercise of their rights guaranteed in Section 7 of the Act, the Respondent has engaged in and is engaging in unfair labor prac-

tices within the meaning of Section 8 (1) of the Act and Section 8 (a) (1) of the Amended Act.

4. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2 (6) and (7) of both the Act and of the Amended Act.

5. The Respondent has not violated Section 8 (2) of the Act or Section 8 (a) (2) of the Amended Act by dominating the Engineers.

Recommendations

Upon the above findings of fact and conclusions of law, and upon the entire record in the case, and pursuant to Section 10 (c) of the Act and Section 10 (c) of the Amended Act, the undersigned recommends that Guy F. Atkinson Co., a corporation, J. A. Jones Construction Co., a corporation, d/b/a Guy F. Atkinson Co. and J. A. Jones Construction Co., of Richland, Washington, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discouraging membership in International Association of Machinists, by discharging and refusing to reinstate any of its employees or in any manner discriminating in regard to the hire and tenure of employment or any term or condition of employment;

(b) Interfering with the administration of International Union of Operating Engineers, Local 370, AFL, or with the formation or administration of any other labor organization, and for contribu-

ting support to the above-named labor organization, or to any other organization;

(c) Recognizing International Union of Operating Engineers, Local 370, AFL, or any successor thereof, as the representative of any of its employees for the purposes of collective bargaining with respect to grievances, labor disputes, wages, rates of pay, hours of employment, or other conditions of employment, unless and until such organization shall have been certified by the Board as the representative of the employees;

(d) Giving effect to or performing its contract dated as of August 16, 1947, with International Union of Operating Engineers, Local 370, AFL, relating to rates of pay, wages, hours of employment, and other conditions of employment, or any extension, renewal, modification, or supplement thereof, or any superseding contract with the said Engineers or any successor thereof, without prejudice, however, to the assertion by the employees of any legal right thereby acquired;

(e) Discouraging membership in International Association of Machinists, or any other labor organization of its employees, or encouraging membership in International Union of Operating Engineers, Local 370, AFL, or any other labor organization of its employees by discharging and refusing to reinstate any of its employees, or in any other manner discriminating in regard to the hire or tenure of employment or other term or condition of employment;

(f) In any other manner interfering with, re-

straining, or coercing its employees in the exercise of the right to self-organization to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purposes of collective bargaining or other mutual aid and protection, as guaranteed in Section 7 of the Act and in Section 7 of the Amended Act.

2. Take the following affirmative action which the undersigned finds will effectuate the policies of the Act and of the Amended Act:

(a) Withdraw and withhold recognition from International Union of Operating Engineers, Local 370, AFL, or any successor thereof, as the representative of any of its employees for the purpose of collective bargaining with respect to grievances, labor disputes, wages, rates of pay, hours of employment, or other conditions of employment, unless and until the said Engineers or its successor shall have been certified by the Board as the representative of the employees;

(b) Offer to Chester R. Hewes immediate and full reinstatement to his former or substantially equivalent position, without prejudice to his seniority or other rights and privileges and make him whole in the manner set forth in Section V, entitled "The remedy";

(c) Post at its plant in Richland, Washington, copies of the notice attached hereto and marked Appendix. Copies of said notice to be furnished by the Regional Director for the Nineteenth Region, after being signed by representatives of the

Respondent, shall be posted by the Respondent immediately upon receipt thereof, and maintained by it for sixty (60) consecutive days thereafter, in conspicuous places, including all places where notices to the employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notice is not altered, defaced, or covered by any other material;

(d) Notify the Regional Director for the Nineteenth Region in writing, within twenty (20) days from the date of the receipt of this Intermediate Report, what steps the Respondent has taken to comply herewith.

It is further recommended that unless on or before twenty (20) days from the receipt of this Intermediate Report, the Respondent notify said Regional Director in writing that it will comply with the foregoing recommendations, the National Labor Relations Board issue an order requiring the Respondent to take the actions of the aforesaid.

It is further recommended that the complaint be dismissed insofar as it alleges that the Respondent violated Section 8 (2) of the Act and Section 8 (a) (2) of the Amended Act.

As provided in Section 203.46 of the Rules and Regulations of the National Labor Relations Board —Series 5, as amended August 18, 1948, any party may, within twenty (20) days from the date of service of the order transferring the case to the Board, pursuant to Section 203.45 of said Rules and Regulations, filed with the Board, Washington 25, D. C., an original and six copies of a state-

ment in writing setting forth such exceptions to the Intermediate Report and Recommended Order or to any other part of the record or proceeding (including rulings upon all motions or objections) as he relies upon, together with the original and six copies of a brief in support thereof; and any party may, within the same period, file an original and six copies of a brief in support of the Intermediate Report and Recommended Order. Immediately upon the filing of such statement of exceptions and/or briefs, the party filing the same shall serve a copy thereof upon each of the other parties. Statements of exceptions and briefs shall designate by precise citation the portions of the record relied upon and shall be legibly printed or mimeographed, and if mimeographed shall be double spaced. Proof of service on the other parties of all papers filed with the Board shall be promptly made as required by Section 203.85. As further provided in said Section 203.46 should any party desire permission to argue orally before the Board, request therefor must be made in writing to the Board within ten (10) days from the date of service of the order transferring the case to the Board.

In the event no Statement of Exceptions is filed as provided by the aforesaid Rules and Regulations, the findings, conclusions, recommendations, and recommended order herein contained shall, as provided in Section 203.48 of said Rules and Regulations, be adopted by the Board and become its findings, conclusions, and order, and all objections thereto shall be deemed waived for all purposes.

Dated at Washington, D. C., this 12th day of May, 1949.

/s/ PETER F. WARD,
Trial Examiner.

Appendix

Notice to All Employees
Pursuant to

The Recommendations of a Trial Examiner of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, and said Act as amended, we hereby notify our employees that:

We Will Not interfere with the administration of International Union of Operating Engineers, Local 370, AFL, or with the formation or administration of any other labor organization, or contribute support to the above-named labor organization or any other labor organization.

We Will Not in any manner interfere with, restrain, or coerce our employees in the exercise of their rights to self-organization, to form labor organizations, to join or assist International Association of Machinists, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection.

We Will Withdraw and Withhold recognition of International Union of Operating Engineers, Local 370, AFL, as representative of our employees for the purpose of collective bargaining until such time as the said Engineers may be certified as their representative by the Board and we will not give effect to or perform the contract now in existence with said organizations pending such contingency.

We Will Offer to Chester R. Hewes immediate and full reinstatement to his former or substantially equivalent position without prejudice to any seniority or other rights and privileges, previously enjoyed, and make him whole for any loss of pay as a result of the discrimination in the manner directed by the Trial Examiner in his Intermediate Report under the Section entitled "The remedy," a copy of which Intermediate Report is on file at the office of the undersigned and may be inspected by interested persons during office hours.

All our employees are free to become or remain members of International Association of Machinists or any other labor organization.

Dated.....

GUY F. ATKINSON CO. and
J. A. JONES CONSTRUCTION CO.
(Employer.)

By.....
(Representative.) (Title.)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

Filed in informal file.

Before the National Labor Relations Board

[Title of Cause.]

RESPONDENT EMPLOYER'S MOTION FOR RECONSIDERATION OF DECISION AND ORDER

Guy F. Atkinson Company, a corporation, and J. A. Jones Construction Co., a corporation, doing business as Guy F. Atkinson Company and J. A. Jones Construction Co., a joint venture, the respondent employer in the above proceeding, has been served with a copy of the Decision and Order issued in the above case under date of June 9, 1950.

Respondent employer, having considered the Decision and Order and the grounds stated therein, hereby files with the National Labor Relations Board this Motion for Reconsideration for the purpose of requesting that the Board, upon such reasonable notice as it may determine, reconsider said Decision and Order and thereupon modify and set aside the same in whole or in part, thereupon finding that the discharge of complainant Chester R.

Hewes on Febraury 19, 1948, was not a violation of Section 8 (a) (3) and 8 (a) (1) of the Labor Management Relations Act of 1947.

The Specific grounds upon which this Motion for Reconsideration is made are stated hereinafter.

I.

Nature of the Findings of the Board as Stated in the Decision and Order.

The Board's decision, stripped of surplusage, makes in sequence about fourteen separate findings. For convenience in the presentation of this Motion, and so that Respondent's understanding of the Decision may be made clear to all who are interested and concerned, we state that the basic findings are the following:

(1) The operations of the Respondent affect commerce.

(2) The Board did not choose to exercise jurisdiction over the construction industry under the original Act.

(3) The Board's abstention from exercising jurisdiction over the construction industry under the original Act was an administrative choice rather than a legal necessity.

(4) Since 1947, under the amended Act, the Board has asserted jurisdiction over substantial construction projects, including this one.

(5) The policies of the Act will be effectuated by the exercise of jurisdiction in this instance.

(6) Because of Section 102 of the amended Act, the availability of the closed-shop contract of August 16, 1947, as a substantive defense must be determined under the original Act.

(7) In virtually all categories, including that of operating engineers, the work force employed at the time the contract was signed was not at all representative of that shortly to be employed.

(8) Without attempting to determine the scope of an appropriate unit, the (Operating Engineers) union could not have been, as required by Section 8(3) of the original Act, the representative of the employees in an appropriate unit.

(9) Congress made no exception to Section 8(3) of the original Act based upon custom in any industry, and the Board cannot give effect to a custom contrary to the statute.

(10) The fact that the Contract was executed in a manner customary in the construction industry is no justification.

(11) The fact that the Respondent may have acted in good faith or in the presence of a national emergency is not a sufficient legal defense.

(12) The Respondent could not have been charged with refusal to bargain, since the (Operating Engineers) Union was not the representative of the employees.

(13) The contract relied on as a defense to

the discharge of complainant Hewes is not within the protection of the proviso to Section 8(3) of the original Act.

(14) The discharge of complainant Hewes violated Section 8(a) (3) and 8(a) (1) of the amended Act.

II.

The Decision Fails to Consider or Answer the One Basic Issue That the Board Members Themselves Stressed at the Oral Argument

Respondent submits that a reading of the Decision will disclose that it is devoid of any discussion of the very basic issue which the Board members themselves posed at the outset of the oral argument.

This controlling issue is not decided against Respondent and in favor of complainant Hewes. It is not decided at all! It is not even discussed! The Decision would lead one to believe that the Board members did not understand it was presented, or that this case depended upon an answer to it.

A. The Way the Board Members Posed the Basic Issue

At the oral argument on the morning of December 19, 1949, Board Chairman Paul M. Herzog participated actively in clearing away the confusing collateral issues, and focussing sharply upon the controlling and basic issue upon which this proceeding was to be finally decided.

During the early stages of the opening statement by the representative of Respondent, who made the first appearance, the Chairman asked pointedly:

"Chairman Herzog: I do not know how other counsel are going to feel about that. I am not stating what my own final position is, but——

"Let me ask you this: If this was a Wagner Act issue, although coming up in 1949 before us, certain principles enunciated by the old Board under the Wagner Act would be sufficient to protect your client against liability?

"Mr. Johnson: That is the way we view that."

(Tr. p. 20, emphasis added).

After representatives of all of the parties had concluded their opening statements, Board Member Abe Murdock again stated this fundamental issue with clarity and emphasis, directing the final minutes of the rebuttal argument toward an answer to it. This was the colloquy:

"Mr. Murdock: Under Section 102 of the Taft-Hartley Act, and due to the fact that under the Wagner Act this Board never asserted jurisdiction over the construction industry, does that fact distinguish this case?

"Mr. Johnson: Yes, I think it does. I think you have put your finger right on the essential point.

"Mr. Murdock: It seems to me that one of the very important aspects of the case is that the Board never asserted jurisdiction over the construction industry under the Wagner Act and then, if we come to the conclusion that

this contract was entered into subject to the Wagner Act, what then?

"Mr. Johnson: That is the very point, Senator."

(Tr. p. 96, emphasis added).

B. The Nature of the Basic and Controlling Issue.

Because of those questions and the discussion that followed them, Respondent was confident that the Board members and all of the parties who were represented at the hearing understood that one clear-cut issue would control the ultimate determination of the legality of the closed-shop contract of August 16, 1947.

That basic issue seemed to be presented as follows:

(1) Assuming that the legality of the contract must be determined under the original Wagner Act; and

(2) Assuming that under the original Wagner Act the Board did not assert jurisdiction over the construction industry;

Then, This Is the Issue:

Is the legality of the contract to be determined by the provisions of the original Wagner Act as it was interpreted up to August 23, 1947, by the Board then administering it, on the basis of principles of administrative interpretation then enunciated and carried out, even though the determination in this proceeding is made at a later date when, concededly, a new and different policy of administrative interpretation is being applied to current problems under the amended Labor Management Relations Act?

Stated another way, the issue is:

Does the pre-August 23, 1947, Wagner Act era administrative interpretation control?

Respondent's prompt answer to the Board members' questions was that the determination of the contract's legality had to be based upon both the original Wagner Act language and the Wagner Act administrative interpertation.

C. How the Basic Issue was Discussed at the Oral Argument.

In order that the discussion of the basic issue at the December 19th oral argument may be clear, Respondent refers to these portions of the Transcript:

> "Chairman Herzog: As I read the Act and note that it is only a one-year contract and that it was executed five days before the effective date of the Taft-Hartley Act on August 22nd, 1947, Section 102 of the present statute seems to me to govern.
>
> "Mr. Johnson: That is right.
>
> "Chairman Herzog: I didn't see any particular reference to that in the Intermediate Report. I wanted to ask all counsel to help me a little on that point.
>
> "It may well be that it does not make very much difference but yet it seems to me that in the Atkinson and Jones Case, as distinguished from some of the matters that we will be taking up this afternoon, the real issue is the legality

of that contract under the Wagner Act. Am I wrong?

"Mr. Johnson: I take that position.

"I agree with you that it does not appear to be covered extensively, shall I say, instead of adequately in the intermediate report, but I think that is of major importance and I have that noted as one of my concluding remarks that as I view it, this contract is to be construed and its legality determined by Section 102 and, of course, we are thrown back to Wagner Act rulings and as I see it we are able to avail ourselves and the Board is able to determine the case not only on the statute as it then existed but on the statute as interpreted at that time by the Board.

"In that situation, we take the position that clearly what was done here would not have been a violation of the Wagner Act and therefore under Section 102 it is not a violation to have done the same thing by agreement entered into prior to August 23, 1947 . . .

"Chairman Herzog: I do not know how other counsel are going to feel about that. I am not stating what my own final position is, but

"Let me ask you this: If this was a Wagner Act issue, although coming up in 1949 before us, certain principles enunciated by the old Board under the Wagner Act would be sufficient to protect your client against liability?

"Mr. Johnson: That is the way we view that.

"Chairman Herzog: Now what is it you have in mind on that point?

"Mr. Johnson: I have this in mind, Mr. Chairman: That by, I will say almost unanimous Board decision and policy during the Wagner Act era, this Board held administratively that the Act did not apply to the building and construction industry and that no certification was necessary in order for a contractor and union, without fear of unfair practice charges to negotiate a completely closed shop union.

"Chairman Herzog: So you would apply the old Board's Doctrine on the exercise of jurisdiction under the Wagner Act to this contract?

"Mr. Johnson: I would."

(Tr. pp. 18-19-20-21 emphasis added.)

D. The Manner in Which the Decision Disposes of the Controlling Issue

The Decision disposes of the vital issue without determining it, or even recognizing it.

One short paragraph sets forth the full discussion on the question of the assertion of jurisdiction over the construction industry. This is that paragraph in its entirety:

"Although the briefs of the Respondent and the Operating Engineers point to the non-assertion of jurisdiction over construction projects under the original Act, such abstention was an administrative choice rather than a legal necessity,[2] and does not estop our present exercise

of jurisdiction.[3] Indeed, since 1947, under the amended Act, we have asserted jurisdiction over substantial construction projects, including this very project."

It will be seen that this part of the Decision states three findings, as follows:

(1) Right up to August 23, 1947, the Wagner Act Board abstained from exercising jurisdiction over the construction industry under the original Wagner Act;

(2) The Wagner Act Board's abstention was an administrative choice rather than a legal necessity;

(3) Since August 23, 1947, the present Board has asserted jurisdiction over substantial construction projects under the amended Act.

Respondent has no quarrel with any of those findings. The portions of the Transcript that we have set out under II, C above demonstrates our agreement with the first two such findings. At another point in the oral argument Respondent's counsel was asked his position, and that of Respondent, on the third such finding. Again, our answer was identical with the Board's finding. This was the discussion:

"Mr. Houston: Do you have a position as to whether or not the Board has authority to exercise discretion and whether or not they ought to assert jurisdiction in the construction industry?

"Mr. Johnson: I can answer that for Atkinson-Jones.

"Mr. Houston: Yes.

"Mr. Johnson: Yes, sir, we have considered that from the legal situation since the effective date and I will say before the effective date of the Taft-Hartley Act and it has been our considered opinion, based not only upon my legal views but others,' that because of the nature of the work that our people do, month in and month out, in all of the various states and throughout the world that, unquestionably, our type of work comes within the Act." (Tr. pp. 102-103, emphasis added.)

III.

The Board Should Reconsider the Case and Make a Finding on the Basic Issue

Respondent's protest on this Motion is against the failure of the Board to make any finding at all on the controlling issue.

Specifically, we call to the Board's attention that it should have made a separate and additional finding which should have been inserted between the second and third findings discussed in II, D above. That missing finding, which we would suggest should be supplied upon the reconsideration requested herein, would be substantially as follows:

"The administrative policy or choice, of abstaining from asserting jurisdiction over the

construction industry, will continue to be recognized and applied by us in cases which under Section 102, must be determined on the basis of the original Act."

With such a finding added, and the present Decision presents no reason why it should not be, it would then be necessary for the Board to find that:

"The closed-shop contract of August 16, 1947, between the Respondent and the Operating Engineers is a valid defense to the discharge of Chester R. Hewes on February 19, 1948."

That finding should be substituted, upon reconsideration, for the present finding:

"2. Like the Trial Examiner, we must find that the closed-shop contract of August 16, 1947, between the Respondent and the Operating Engineers[5] is not a valid defense to the discharge of Chester R. Hewes[6] on February 19, 1948."

The reconsidered Decision should end there, adding only the necessary finding that no unfair labor practice was committed. This would make it possible to eliminate from the present Decision the ill-considered and confusing discussion as to whether:

"the contracting union was the statutory representative of the employees in an appropriate unit when the agreement was made."

Respondent suggests to the Board with assurance that reconsideration of this proceeding, and a termination of the new and reconsidered decision at the

place and in the manner suggested in this Motion would be a major contribution toward ending the unrest, confusion and concern now prevailing throughout the entire construction industry because of the Board's complete failure to grasp the significance of the vital issue, or its unwillingness to determine it.

IV.

The Wagner Act Board's Administrative Choice Not to Assert Jurisdiction Over the Construction Industry Was Based on Compelling Reasons and Should Continue To Be Applied to Cases Decided Under the Original Act

The basis of the Board's policy in abstaining from asserting jurisdiction over the construction industry under the original Act was discussed very recently by Board Member Reynolds in his dissenting opinion in the Denver Building Trades Council-Churches decision (June 22, 1950, 90 NLRB No. 66). He stated:

> "Before the amendments to the Act, the Board did not customarily exercise jurisdiction over operations in the building and construction industry because it did not believe that it would effectuate the policies of the Act to assert jurisdiction over an industry which it viewed as relatively local in character."

Cited in support of that statement were the familiar construction industry decisions of the Wagner Act era:

> Johns-Manville Corporation and Johns-Manville Sales Corporation, 61 NLRB 1;
>
> Brown and Root, Inc., et al., 51 NLRB 820.

It is submitted that there were other considered and compelling reasons, other than any possible inertia on the part of the Board, that contributed to the administrative abstention from asserting jurisdiction over the construction industry.

There were, and still are, three major factors that must have motivated the Board in reaching the most satisfactory solution to the very practical problems presented by the construction industry. They were:

(a) The Wagner Act was primarily a Bill of Rights for labor, and in the construction industry the unions had demonstrated their ability to organize the crafts involved and to maintain satisfactory working conditions.

(b) No assurance of continuity of work for any single employer could be counted upon, because construction work was primarily obtained through competitive bids. Very seldom were any single group of workers employed throughout a project (each craft coming and going as its type of work was required), and in most areas of the country weather conditions cut the construction season to seven to eight months rather than a full twelve months' period.

The concept of a "pool" of employees represented by their local and international unions serving all of the construction employers in the area had not been then advanced, and under the situation as it existed at that time, election

procedures involving a single employer were not practical.

(c) Withholding recognition from the regularly constituted craft unions until such time as a given "unit" was substantially manned would mean, in practice, that each employer would be free to impose such working conditions as he could get individual men to work under until the job reached substantial proportions. Then on many jobs before normal election procedures could be accomplished and certification obtained, the bulk of the work would be completed. This would work a particular hardship on the basic crafts for whom the job pattern would be set early in the construction projects. Their business agents would continually have the uphill job of negotiating changes in conditions under which work was actually going on.

Conversely, the employer would be subject to work stoppages at the whim of individual members of those crafts who normally would have only one or two men on the job and who, in each instance, would arrive on the job without any prior contract. For example, if the cement finishing is stopped at any given stage the entire job is soon held up accordingly. If these men were able to make new demands daily (just when the concrete was being poured), the employer would be in the position of having to accede or stop the job. He would still be unable to make any concession granted

by him the consideration for a firm contract that would cover the balance of the project.

As a practical method, the use of area type bargaining and pre-job conferences takes out of the bidding a "labor contingency" that every contractor must otherwise add to his bid as increased cost. This practice reduces the total cost of construction to the owner or agency for whom it is done. The rule now promulgated by the Board needlessly adds this contingency in the construction estimate and creates an added cost at a time when every effort should be made to maintain stability and reduce building costs.

Respondent submits that the administrative policy of abstention was based on sound, well-considered reasons. The Board, although now asserting jurisdiction over construction under the amended Act, should even now continue to apply to cases that must be decided under the original act both the statutory language and the administrative interpretation that the thinking, the atmosphere and the practical considerations of the Wagner Act era compelled.

Respondent's counsel stated our position at the oral argument, when he said:

"Mr. Johnson: . . . While I was not a member of the Board at the time and did not have too intimate pipe lines into their thinking, I would gather that it was issues of that type: the urgent nature of the construction; the problems which are involved in organizing and

recruiting a job; and these jurisdictional problems they were concerned with. There was nothing, I gathered, they were more anxious to get rid of than these jurisdictional disputes, because there was no way under the Wagner Act of clearing them up, as the Chairman suggested. How could we have lawfully done it? We wanted to do it not only legally but morally right. What could we have done? There were no facilities available under the Wagner Act . . .

"Considering the general practical considerations which the Wagner Act Board knew about, which caused them to rule administratively that they would not take jurisdiction of the industry, it seems to me that in fairness, that policy must be recognized and followed in your consideration of this case."

(Tr. pp. 98-99, emphasis added.)

As has been made clear, Respondent contends that recognizing and applying the Wagner Act administrative interpretation today or next month to cases required to be decided under the original Act does not conflict with or estop the Board's policy of now asserting jurisdiction under the amended Act. There are simply two different sets of rules applying contemporaneously to two different factual conditions.

V.

The Board Failed to Consider as a Defense the Area-Wide Multiple Employer Contract Between the Spokane Chapter of the Associated

General Contractors of America, Inc. and Operating Engineers Union, Local No. 370

The Decision considers only the contract of August 16, 1947. There is no reference to or consideration of the contract entered into on February 28, 1947, between the Spokane Chapter of The Associated General Contractors of America, Inc. and the International Union of Operating Engineers, Local 370. This agreement was referred to at the oral argument by Respondent's counsel:

> "Mr. Johnson: The next point that we want to make to you, Mr. Chairman, is that at the time that the Atkinson-Jones Company held this so-called pre-job conference on August 14 to 16 of 1947, which is referred to extensively in the record and which I am not going to bore you with, there was then in existence in the area involved an agreement between the Operating Engineers Union, which is here involved, and the Spokane chapter of the Associated General Contractors, dated February 28, 1947, covering as we view it all of the work or type of work here involved and that in the case of this contract which was executed both prior to the enactment date and effective date of the Amended Act, that the provision was a closed shop contract so that there was available to the contractors when they came into the area an available multiple employer area-wide contract with this individual union providing for a closed shop.
>
> "I do desire to call your attention to the

important fact that this area-wide agreement with the Spokane Chapter of the Associated General Contractors was limited to operating engineers and teamsters.

"Obviously it is not adequate to cover the craft breakdown which is indicated by the exhibits just introduced."

(Tr. pp. 16-17, emphasis added.)

This contract covered the territory involved; it covered the type of work involved; it covered the Union involved; it covered the sponsoring joint venture of Respondent (Guy F. Atkinson Company became affiliated with the Spokane Chapter, and bound by the terms of the agreement on July 1, 1947).

The area-wide multiple-employer contract was signed before either the enactment date or the effective date of the amended Act. It contained a closed-shop clause, and was to be effective until January 1, 1949.

Respondent points to the fact that very recently the Board has recognized that in representation cases a construction employers' association and its members must be regarded as a single enterprise. In General Contracting Employers Association (June 22, 1950), 90 NLRB No. 78, the Board stated:

"Consistent with our well-established policy in representation cases, we find that in passing upon the jurisdictional issue herein, the Association and its members must be regarded as a single enterprise. That the totality of the operations, in volume and character, of all members of the Association has a substantial effect

> on interstate commerce is apparent. The fact that we might not assert jurisdiction as to each member if before the Board individually or that this proceeding does not directly involve all its members is not here material, because the alleged unfair labor practices are attributed to the Association itself and are the result of the application of a common labor policy by the Association on behalf of its members, including those involved herein."

Respondent raises this point of defense as an alternative to its contention that the Wagner Act administrative policy should be applied in this case. That contention is sound, but even if the Board should reject it and cling to its finding in the present Decision, this point would be a separate defense.

The point to be emphasized is that if the members of the multiple-employer unit are to be recognized as a single unit, then recognition of the appropriate unit should be based upon the pool of employees of all of the individual employers making up the unit, and upon all of the work being performed by all of the individual employers. Applying that proper method of determining the scope of an appropriate unit, the Spokane A.G.C. Chapter clearly was entitled to negotiate with the Operating Engineers Union, Local 370. Respondent, as one of the individual employers for whose benefit the contract was negotiated, was entitled to all of the benefits and protective advantages of the multiple-employer plan of negotiation.

The Board should grant the motion to reconsider

its Decision and Order, and render a new Decision embodying a finding recognizing the multiple-employer contract. It should also find the closed-shop provision of that agreement to be a valid defense to the charge of complainant.

VI.

Conclusion

For the reasons, and upon the grounds stated above, Respondent moves that the Board reconsider its Decision and Order, and thereupon modify and set them aside as herein requested.

Dated: July 3, 1950.

/s/ GARDINER JOHNSON,
Attorney for Respondent-Employer.

Received July 7, 1950.

Filed in formal file.

Before the National Labor Relations Board

[Title of Cause.]

PETITION OF ENGINEERS LOCAL UNION 370 FOR RECONSIDERATION OF DECISION AND ORDER AND FOR REOPENING THE RECORD

Engineers Union Local 370 herein petitions the National Labor Relations Board to reconsider its Decision in the instant case and to reopen the

Record for the inclusion of certain later developed pertinent material as follows:

I.

The Requirement for Posting of Notice

The National Labor Relations Board has ordered that a "Notice to All Employees" be posted by the respondent Atkinson-Jones, which notice is titled Appendix A and attached to the Board's Order.

The National Labor Relations Board's Decision in the instant case was based upon a construction of the collective bargaining agreement of August 16, 1947, (General Counsel Exhibit No. 5), by the terms of which agreement the respondent, Atkinson-Jones, recognized Local 370, International Union of Operating Engineers, as the collective bargaining agent for certain of its employees doing work within the jurisdiction of that organization. A subsequent agreement effective August 10, 1948, (Hewes Exhibit No. 1), was later entered into between the respondent and the several building trades unions affiliated with the American Federation of Labor and covering respondent's work at Hanford Works, Richland, Washington. Since the effective date of this agreement, August 10, 1948, there has been no bargaining recognition by the respondent, Atkinson-Jones, of Local 370, International Union of Operating Engineers, as the sole and exclusive bargaining agent for any of Atkinson-Jones employees, save only to the extent that the reservation of recognition embodied on Page 13, under the Article

entitled V, "Recognition" of the agreement of August 10, 1948, was resolved by the Board's certification of the Engineers in Case No. 19-RC-138. In fact, however, even prior to August 10, 1948, for all practical purposes collective bargaining between the respondent Atkinson-Jones and Local 370, International Union of Operating Engineers, had ceased by reason of the filing of the charges herein.

In recognition of the obligations devolving upon the parties by reason of the provisions of the amended Act, the August 10, 1948, agreement may be seen as an "Open Shop" contract pending compliance by the Engineers Local 370 and the several other signatory unions with the election requirements of the Act.

In support of the foregoing the following testimony elicited at the hearing held at Yakima, Washington, on November 4 and 5, 1948, is pertinent. (Pages 69 and 70 of the Transcript).

> Question—Mr. Gill: "I see. In other words, the company has not made any decision up to this date that they would not hire back Mr. Hewes?"
>
> Answer—Mr. Hibberd. "That is right."
>
> Question—"At his former job, or a similar job, if the job were available and he applied for it?"
>
> Answer—"Yes."
>
> Question—"Do your records show any application by Mr. Hewes for his former job, or a similar job, after February 18, 1947?"
>
> Answer—"No, we have no application blank in the records."

Question—"Are there any records of the company to which you have had access, or that come within your knowledge, which show that respondent would not hire back Mr. Hewes if he applied for his job and the job was available, or a similar job, subsequent to August 10, 1948?"

Answer—"If Mr. Hewes applied for rehire, the decision in the personnel office as to eligibility would be based on the records of this original card, of which this is a photostat."

(The above testimony was presented in the presence of Chester Hewes, the charging party, National Labor Relations Board Counsel, Patrick J. Walker, and Counsel E. J. Egan for Chester Hewes.)

Subsequent to August 10, 1948, therefore, Hewes was eligible for employment by Atkinson-Jones without any requirement for union clearance or membership within Local 370, International Union of Operating Engineers, or of any labor organization, subject only to the availability of work.

Collective Bargaining Agreement of 1948

The collective bargaining agreement, (General Counsel Exhibit No. 5), pursuant to the terms of which Mr. Hewes was discharged, expired midnight August 10, 1948. The current contract, (Hewes Exhibit No. 1), took effect August 11, 1948, and the respondent's relations with the several unions signatory thereto continued to be governed by the substantive provisions of this collective bargaining agreement. Since August 10, 1948, therefore, no

employee is required to obtain union clearance prior to taking employment with respondent (Molthan's testimony Page 145, Hibberd's testimony Page 81).

The current contract effective between August 10, 1948, and the present time, cannot be considered to be tainted with any of the objectionable features which the Order found present in the prior contract. The all-inclusive direction by the Board to Respondent with regard to the posting of notice should in no event obtain to this later collective bargaining agreement, the terms of which provide for open-shop operation by respondent, and which contract is in no wise pertinent to the discharge of Hewes.

Proceedings in N.L.R.B. #19-RC-138

Subsequent to the initial hearings in the instant case, a National Labor Relations Board election was held following a hearing in a unit of Respondent, Atkinson-Jones, employees working the construction machine shops at Hanford Works. Machinists Lodge 1743, International Association of Machinists, of which Hewes was a member, was a party to this election as well as Local 370, International Union of Operating Engineers. The National Labor Relations Board saw fit to hold this election in full and complete recognition of the fact that all of the employees of Respondent, Atkinson-Jones, involved were free from any undue influence and that the election might properly be held without the posting of any Notice by the company disclaiming recognition of Engineers Local 370.

As a result of the election of June 24, 1949, Local

370, International Union of Operating Engineers, was recognized by the National Labor Relations Board as the proper collective bargaining representative of Respondent's employees in an appropriate unit in the construction machine shops, and Engineers Local 370 continues to be so recognized.

At the present time there is pending a further, second, successive representation petition of International Association of Machinists, Lodge 1743, (No. 19-RC-601, dated June 8, 1950), covering the same unit of Respondent's employees as appeared in the similar petition out of which grew the election of June 24, 1949.

II.

Closing of the "#3000 Area" Shop

On or about the first day of June, 1949, the 3000 area machine shop where Hewes had been employed ceased operations and has since that time been abandoned by the respondent as an operating shop. The curtailment of operations at this shop and their eventual abandonment as well as the 101 Area shop, which also has since been closed, was predicted in the record by Mr. Hibberd's testimony. (Page 206 of the Transcript.)

Your petitioner has no facts, nor does the record show, that there was any available work for the charging party, Hewes, subsequent to the date of abandonment of this shop. Even at the time of the hearing, to wit, November 4 and 5, 1948, Mr. Hibberd testified to the substantial diminution in work at both the 101 and 3000 area shops even though at

that date there was still some work being performed in those places.

The petitioner herein therefore requests that the Board reopen the record for the purpose of considering and receiving further evidence on this subject, inasmuch as these issues are both pertinent and material to any decision binding on the parties.

III.

The Board concurred with the findings of the Trial Examiner that on August 16, 1947:

> "the work force at the time the contract was signed was not at all representative of that shortly to be employed."
>
> "Under these circumstances, the union could not have been, as required by the proviso, to Section VIII (3), representative of the employees in an appropriate unit."

The Board further pointed up its argument by demonstrating that at the time the contract was signed, a total of 125 manual employees were employed by the Respondent, Atkinson-Jones, whereas, later the work force grew eventually to 5,400 manual employees. The implication therefore may be drawn that sometime between August 16, 1947, and the date of hearing a determination of an appropriate unit might have been made.

At the date of hearing, Respondent, Atkinson-Jones', manual pay roll was enjoying a period of continuous expansion, however at varying rates of growth. Subsequent to the time of hearing, however, an equally radical contraction of the manual

pay rolls has taken place, such that in November, 1949, the total number of Operating Engineers employed by Respondent on the project had fallen from a one-time peak of approximately 1600 to only 27 men. This reduction of force was reflected in comparable reductions in all manual crafts.

At the present time the pay roll is again in the process of expansion, (approximately 300 Operating Engineers employed), and it is impossible to predict what the eventual total employment will be or at what time a stable pay roll will be achieved. In the presence of such pay roll abnormalities, it is respectfully urged that the Board should in the matter of law, refuse jurisdiction over this project.

N.L.R.B. Failure to Process R. C. Petitions

Whether or not these payroll fluctuations were taken into consideration by the Board in its neglect or refusal to process both representation and union authorization petitions of the several unions involved in the Hanford Works operations of respondent, nevertheless the fact exists that prior to June 9, 1949, the date of the decision and direction of election in Case No. 19-RC-138, the Board refused to process all such petitions, including an R. C. petition filed in behalf of Local No. 370, International Union of Operating Engineers, therefore making it virtually impossible for either the Operating Engineers or any other union signatory to the collective bargaining agreement with respondent to comply with the provisions of the amended Act authorizing union representation and union security.

IV.

The Existence of an "Appropriate Unit"

The findings of the Trial Examiner, Page 15, Line 14, hold the bargaining unit described in the August 16, 1947, contract to be inappropriate. Assuming this to be an inappropriate unit, therefore, implies that there must exist an appropriate unit.

As one of the criteria for the determination of an appropriate unit, the Board has consistently looked for a relatively normal and stable pay roll. The reticence of the National Labor Relations Board to process these several petitions before it indicates that the criterion of a normal pay roll had not been achieved to its satisfaction at any time prior to June 9, 1949. In view of subsequent developments, it now appears that a normal pay roll has not as yet been achieved.

The petitioner, therefore, respectfully requests that the Board reopen the record for the hearing of further evidence with regard to pay roll fluctuations subsequent to November 4 and 5, 1948.

V.

The Application of Section 102 of the Amended Act

The application of Section 102 of the Amended Act to the Collective Bargaining Agreement of 1947 was considered in detail by the Board at the hearing held on December 19, 1949, Washington, D. C. The highly pertinent questions posed by both Chairman Herzog and Board member, Murdock,

assumed the application of this Section and considered the point that the 1947 agreement should properly be judged by the application of standards of administrative decisional law developed under the Wagner Act.

Prior to the passage of the Taft-Hartley amendment, the Board as a matter of administrative discretion, had invariably refused to accept jurisdiction over the construction industry. The question is then squarely presented,

> "Shall the 1947 Collective Bargaining Agreement, apparently within the purview of Section 102 of the Taft-Hartley Act, be interpreted in accordance with the rules of decision enforced at the time of its conception or be judged by the ex-post facto application of new policies interpreting a new law?"

Nowhere does the Decision and Order indicate that this question has been squarely faced and answered by the Board.

It is the petitioner's contention that the purpose of the inclusion of Section 102 within the Taft-Hartley Act structure by the Congress must have been proposive rather than meaningless and that the legislative intent may properly be given its framework of meaning in the present case.

VI.

Assumption of Jurisdiction by the N.L.R.B.

The Board has in the very recent past refused to assume jurisdiction of matters involved in the construction industry on the grounds that its assump-

tion of jurisdiction would not effectuate the policies of the National Labor Relations Act as amended. (West Virginia Electric Corporation, 1950, 90 N.L.R.B. #82, June 21, 1950. Pettus-Bannister Company, 1950, 90 N.L.R.B. #80, June 21, 1950.)

The area of administrative discretion which was present under the Wagner Act and which permitted the Board to refuse jurisdiction exists with equal force today and may be applied as the Board sees fit under the facts of the specific case.

The petitioner, therefore, urges that in view of the nature of the work undertaken in the construction program at Hanford Works, the fluctuations in manpower requirements of the program, and the fact that the product to be manufactured in the facilities under construction is specifically excluded by the Atomic Energy Act of 1947 from the channels of Inter-State commerce, the Board reconsider its determination to assume jurisdiction of this matter.

VII.

Brief of the Building and Construction Trades Department of the American Federation of Labor

At the public hearing before the National Labor Relations Board on December 19, 1949, in Washington, D. C., the Building and Construction Trades Department of the American Federation of Labor filed its Brief, which was received and accepted by the Board.

The undersigned petitioner, Party to the Contract, had previous knowledge of the content of said

brief, and to avoid repetition, adopted said brief (with the corrections on pages 18 and 19).

Further, the undersigned petitioner, Party to the Contract, for the convenience of the Board and of the other Parties and to avoid repetition, hereby adopts said Brief, which is attached hereto and hereby made a part hereof and a part of the proceedings in this case, by reference, with the same effect as if set out in full herein.

Conclusion

For the foregoing reasons and upon the grounds stated above, the petitioner herein respectfully urges the Board reconsider its decision and reopen the record for the hearing of further later developed evidence.

By /s/ WILLIAM C. ROBBINS,
Attorney for International Union of Operating Engineers, Local 370.

Of Counsel:

L. PRESLEY GILL,
International Union of Operating Engineers, Local 370.

WILLIAM H. THOMAS,
General Counsel, International Union of Operating Engineers.

Received July 19, 1950.

Filed in formal file.

Before the National Labor Relations Board

[Title of Cause.]

ORDER DENYING MOTION AND PETITION

On June 8, 1950, the Board issued a Decision and Order in the above-entitled proceeding. On July 7, 1950, counsel for the Respondent filed a Motion for reconsideration of the aforesaid Decision and Order; on July 19, 1950, counsel for International Union of Operating Engineers, Local 370, AFL, filed a Petition for reconsideration of the said Decision and Order and for reopening of the record; and thereafter, on August 10, 1950, counsel for Chester R. Hewes, the charging party herein, filed a Reply in resistance to the above motion and petition. The Board having duly considered the matter,

It is Hereby Ordered that the said motion and petition be, and they hereby are, denied, on the ground that they present no matters not previously considered by the Board.

Dated, Washington, D. C., August 25, 1950.

By direction of the Board.

/s/ FRANK M. KLEILER,
Executive Secretary.

Filed in formal file.

Before the National Labor Relations Board
Nineteenth Region

Case No. 19-CA-28

In the Matter of:

GUY F. ATKINSON COMPANY, a Corporation; J. A. JONES CONSTRUCTION COMPANY, a Corporation, Doing Business as GUY F. ATKINSON COMPANY, and J. A. JONES CONSTRUCTION COMPANY,

and

CHESTER R. HEWES,

and

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 370, A.F.L., Party to the Contract.

Thursday, November 4, 1948

Pursuant to notice, the above-entitled matter came on for hearing at 10:00 a.m.

Before: Peter F. Ward,
Trial Examiner.

Appearances:

PATRICK H. WALKER,
Seattle, Washington,

Appearing for the General Counsel of the National Labor Relations Board.

WILLIAM C. ROBBINS,
Richland, Washington,

Appearing for Guy F. Atkinson Company and J. A. Jones Construction Company.

E. J. EAGEN,
1228 Joseph Vance Building,
Seattle, Washington,

Appearing for the Charging Party, Mr. Hewes.

L. PRESLEY GILL,
2800 First Avenue,
Seattle, Washington,

Appearing for International Union of Operating Engineers, Local 370, A. F. of L.

PROCEEDINGS

Trial Examiner Ward: This is the formal hearing before the National Labor Relations Board in the matter of Guy F. Atkinson Company, a corporation; J. A. Jones Construction Company, a corporation, doing business as Guy F. Atkinson Company, and J. A. Jones Construction Company; and Chester R. Hewes; and International Union of Operating Engineers, Local 370, A.F.L., party to the contract; Case No. 19-CA-28.

The Trial Examiner appearing for the National Labor Relations Board is Peter F. Ward.

Counsel will please state all appearances for the record, even though you have signed them.

Mr. Walker: Patrick H. Walker, appearing for the General Counsel of the National Labor Relations Board.

Mr. Eagen: E. J. Eagen, appearing for the charging party, Mr. Hewes.

Mr. Gill: L. Presley Gill, 2800 First Avenue, Seattle, Washington, appearing for International Union of Operating Engineers, Local 370, A. F. of L., designated in this proceeding as "party to the contract."

Mr. Robbins: William C. Robbins, appearing for the Guy F. Atkinson Company and J. A. Jones Construction Company. [4*]

* * *

Mr. Gill: Yes, and his affidavit is here.

I wish to argue first as to Item No. 1, which is a motion to strike based upon the appropriation riders, and I have supported that motion by this portion of Mr. Kelly's affidavit.

Mr. Kelly stated that he is the controller of the Respondents and so acted in August as related in the affidavit.

I am interested in the last five lines: "That on or about the 28th day of August, 1947, he caused to be placed upon a bulletin board maintained by the Respondents at the entrance hallway in the southwest wing of the Respondent's headquarters, an administration building designated locally as Building 200-A, North Richland, Washington, a copy of said agreement; that said bulletin board was used,

among other things, for the general requirements of the Respondents in advising all persons entering said building of various matters pertaining to all phases of employment and personal conduct, charitable drives, security directives, etc."

And he says that in addition this place where this contract was posted was also utilized for the purpose of all personnel processing, to the end that any person employed by the Respondents, manual or non-manual, was required to proceed down the above-described hallway for the purpose of reaching the personnel office, and he states further that this building was also used for the additional purpose of toilet facilities and he states in the following affidavit that this posting remained in effect until January 1, 1948, at which time the administrative offices of the Respondent were changed.

* * *

Mr. Walker: May it please the Examiner, a stipulation has been agreed upon between the Respondent—well, an all-party stipulation. It is as follows:

> "It is hereby stipulated and agreed, by and between the parties hereto, that Guy F. Atkinson Company is a corporation organized and existing under and by virtue of the laws of the State of Nevada. J. A. Jones Construction Company is a corporation organized and existing under and by virtue of the laws of the State of North Carolina. On or about July 25, 1947, and at all times since material hereto, Guy F. Atkinson Company and J. A. Jones Con-

struction Company have associated themselves together in a joint venture, doing business under the firm name and style of Guy F. Atkinson Company and J. A. Jones Construction Company, herein called Respondent."

herein called Respondent."

Trial Examiner Ward: Plural?

Mr. Walker: Singular. It is a joint venture, sir.

"At all times material hereto, respondent has maintained an office and principal place of business at Richland, Washington. At Richland, Washington, respondent at all times material hereto has been engaged in construction work pursuant to the terms of letter subcontract No. G-133, an agreement made July 25, 1947, with General Electric Company, a corporation.

"Respondent in the course and conduct of his business at Richland, Washington, causes and continuously has caused materials consisting of cement, lumber, reinforcing steel, glass, paint, hardware, tools, equipment and other supplies of approximately $20,000,000 in value for the period from July 29, 1947, to April 6, 1948, to be purchased and delivered to it at Richland, Washington. Of such materials, approximately $2½ million in value has been purchased, delivered and transported in interstate commerce from and through States of the United States other than the State of Washington. Approximately $9½ million in value of such materials were produced, fabricated and originated from points outside the State of

Washington and thereafter were transshipped to Respondent from points within the State of Washington; that at all times material hereto the title to all materials produced and fabricated by the Respondent vested in the United States of America; and, further, that from the date of purchase and acceptance of all materials by the Respondent, irrespective of point of origin, title thereto vested in the United States of America; that pursuant to the terms of the said letter subcontract Respondent performs a function of procurement of materials, supplies and equipment of its own accord, all functions of procurement relating to its contractual obligations to General Electric Company as prime contractor for the United States Atomic Energy Commission as owner."

That is the stipulation.

Trial Examiner Ward: All parties have joined in the stipulation?

Mr. Robbins: Yes.

Trial Examiner Ward: And the Union?

Mr. Gill: Well, on being assured by Counsel for the Respondent that these facts as recited by the General Counsel are correct, we join in the stipulation.

* * *

WILLIAM S. HIBBERD

a witness called on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Trial Examiner Ward: What is your name?

A. William S. Hibberd.

Direct Examination

By Mr. Walker:

Q. And are you employed, Mr. Hibberd?

A. Yes, sir.

Q. By whom are you employed?

A. Atkinson-Jones.

Q. In what capacity?

A. Labor Relations Manager.

Q. How long have you held that position?

A. Since the 12th of May, 1948.

* * *

Q. (By Mr. Walker): Is the instrument marked General Counsel's Exhibit 5 for identification a mimeographed copy of a labor agreement bearing date of August 16, 1947, entered into between Atkinson-Jones Company and the other parties signatory thereto?

A. Yes, sir; it appears to be.

Q. In the course of your duties, in your official position, have you learned what the geographical jurisdiction of Local No. 370 of the Operating Engineers may be?

Mr. Gill: I object to the form of the question. It is his opinion of what the jurisdiction is. The

(Testimony of William S. Hibberd.)

document indicates what work is covered. The document indicates what work is covered by this Union.

Mr. Walker: Geographical, I said, Mr. Gill.

Mr. Gill: I will withdraw the objection.

Trial Examiner Ward: You may answer.

A. I don't know that I can give it to you exactly, but I can give you a fairly close designation geographically. Everything in the State of Washington east of the 120th parallel, the panhandle of Idaho and a small part of western Montana.

* * *

Q. (By Mr. Walker): Was Mr. Hewes' employment terminated—if you know—on or about February 19, 1948?

A. According to the corporation records his last date of employment was February 19, 1948.

* * *

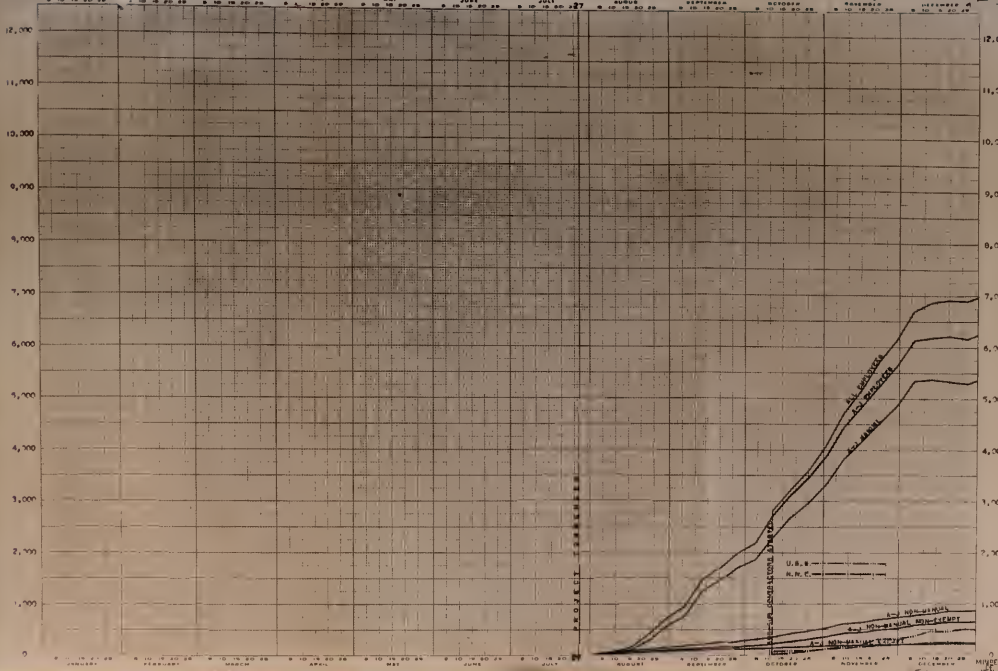
Trial Examiner Ward: The objections will be overruled. General Counsel's Exhibits 2 through I, General Counsel's 3-A and 3-B for identification, General Counsel's Exhibits 4-A and 4-B for identification and General Counsel's Exhibits for identification numbered 5, 6, 7, 8, 9, 10, and 11 will be received in evidence.

(General Counsel's Exhibits 2-A through 2-I, 3-A, 3-B, 4-A, 4-B, and 5 through 11, received in evidence.)

* * *

GENERAL COUNSEL'S EXHIBIT NO. 3-A

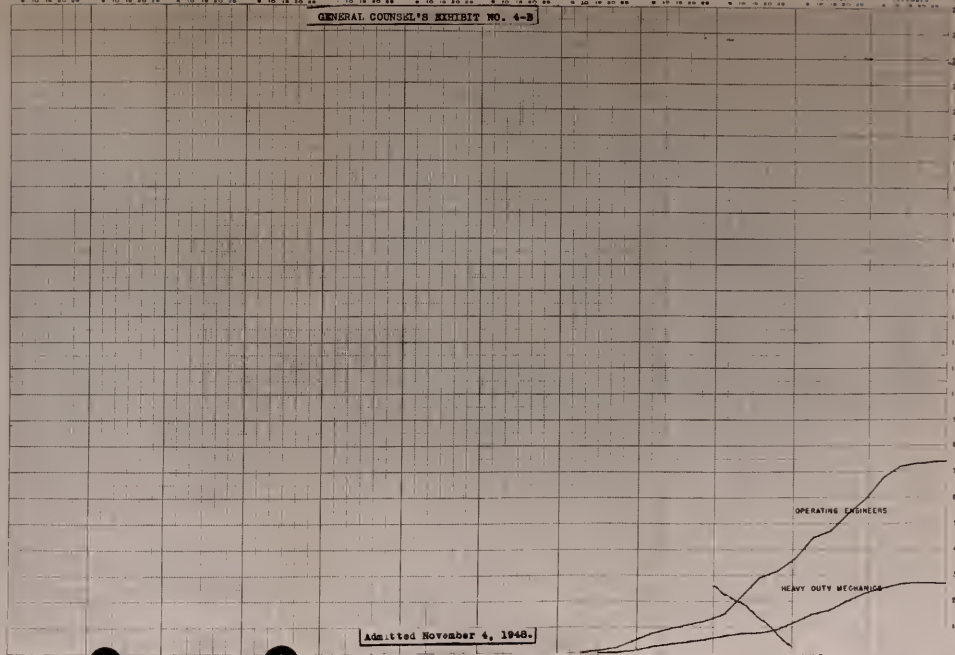
EMPLOYMENT PROGRESS



Admitted November 4, 1948.

EMPLOYMENT PROGRESS OF OPERATING ENGINEERS 1947

GENERAL COUNSEL'S EXHIBIT NO. 4-B



Admitted November 4, 1948.

(Testimony of William S. Hibberd.)

GENERAL COUNSEL'S EXHIBIT No. 5

A-J "Official" File

Agreement

This Agreement is hereby made and entered into this sixteenth day of August, 1947, by and between Guy F. Atkinson Company and J. A. Jones Construction Company, affiliated members of the Associated General Contractors of America, Inc., comprising a joint venture organization under contract with the General Electric Company and the Atomic Energy Commission to perform certain construction work at the Hanford Engineer Works, hereinafter called the Employer and the several International Unions and/or Local Unions affiliated with the Building and Construction Trades Department of the American Federation of Labor having jurisdiction of this territory, hereinafter called the Union, who have, through their duly authorized representatives, executed this Agreement.

Witnesseth

Article I. Parties and Purpose:

Sec. 1. The signatory Employer and the signatory Unions as appear on the signature pages hereof, enter into this Agreement for the purpose of endeavoring to insure continuity of employment, amicable labor-employer relations, and to record the terms of agreement with respect to rates of pay, hours of work and other conditions of employment

(Testimony of William S. Hibberd.)

General Counsel's Exhibit No. 5—(Continued)

arrived at through the process of collective bargaining.

Sec. 2. This Agreement contains all of the covenants and agreements between the parties hereto and nothing outside of this Agreement shall modify, amend or add to its terms.

Sec. 3. For the purpose of this Agreement, the party Employer and the party Unions shall be known and referred to hereinafter as the Employer and the Union respectively. And their representatives signing this Agreement hereby warrant and guarantee their authority to act for, bargain for and bind their respective Employer and Union.

Article II. Work Covered:

Sec. 1. The work covered shall be all work performed by the Employer pursuant to its contract with General Electric Company and Atomic Energy Commission for construction of buildings, facilities, and other items of work in connection with Hanford Engineering Works Project. Because of the nature of the work this Agreement is written to cover, the parties hereto mutually agree that the terms hereof shall be subordinate to the provisions of the contract entered into between the Employer and the General Electric Company and the Atomic Energy Commission.

Article III. Recognition—Employees Covered:

Sec. 1. This Agreement shall cover all employees who are members of the signatory unions who are

(Testimony of William S. Hibberd.)

General Counsel's Exhibit No. 5—(Continued)

performing work within the recognized jurisdiction of such unions as the same is defined by the Building Trades Department of the American Federation of Labor, for which employees the Union is recognized as the sole and exclusive bargaining agent.

Article IV. Hiring and Employment of Workmen:

Sec. 1. It is agreed that the Employer shall hire all employees coming under this Agreement, through the office of the Union or through such other facility as may be designated by the Union; and such employees shall not be put to work unless and until they present a written referral signed by the proper official of the Union or other designated facility. But provided that in the event the Union shall fail to furnish the needed employees within forty-eight (48) hours, he shall be at liberty, without being deemed in violation of this Agreement, to hire them elsewhere; and provided, employees so hired shall, before going to work, obtain clearance in writing from the Union. The Union agrees that they may apply for and be admitted into membership under their regularly established procedure without discrimination and at their customary rates for fees and dues.

Sec. 2. It is understood and agreed that the Employer shall retain in employment only members in good standing of Union or Those Who have signified their intention of becoming members through the regularly established procedure of the Union.

(Testimony of William S. Hibberd.)

General Counsel's Exhibit No. 5—(Continued)

Sec. 3. While the Union assumes all responsibility for the continued membership of its members and the collection of membership dues, it reserves the right to discipline its members and/or those employees who have filed application to become members; and the Employer agrees to, upon written notice from the Union, release from employment any employees who fail to maintain membership in good standing and/or any employee who defaults in his obligation to the Union. It is understood the removal of and replacement of such employees shall not interfere with the operation of the job.

Article V. Sub-Contractors:

Sec. 1. The Employer agrees that any sub-contracts awarded by Employer shall provide that subcontractors will fully comply with this agreement on all work performed by them on said Project.

Article VI. Work Schedule—Overtime—Show Up Time—Holidays:

Sec. 1. Eight (8) consecutive hours, exclusive of lunch period, between 8 a.m. and 5:00 p.m. shall constitute a regular day's work, and forty (40) hours, Monday through Friday, shall constitute a regular week's work for the duration of this Agreement.

Sec. 2. When so elected by the Employer, multiple shifts may be worked for three (3) or more

(Testimony of William S. Hibberd.)

General Counsel's Exhibit No. 5—(Continued)

consecutive days; Employer shall have the right to designate the portions of the work to be performed on a multiple shift basis. When two shifts are worked, each shift shall be for a period of eight (8) hours, with not less than thirty (30) minutes off for lunch on the Employer's time. If a third shift is worked, it shall be for a period of seven and one-half (7½) hours, with not less than thirty (30) minutes off for lunch on the Employer's time, except as set forth in the Schedule "A" of the various signatory unions.

The regular starting time for two or three shift work schedules shall be eight o'clock a.m. Monday. On three shift work the regular work week shall commence as above provided with the first shift on Monday, and shall end at the close of the third shift on Friday.

All work performed in excess of eight (8) hours on a regular single-shift basis, and in excess of seven and one-half (7½) hours or seven (7) hours respectively in the case of two and three shift work as above provided, and on work performed outside the regular starting or finishing time of each work day or shift, and all hours worked in excess of forty (40) per week shall be considered as overtime and paid for at the overtime rate as provided in Schedule "A" attached hereto. Except as above provided with reference to shift work, overtime shall be paid for on work performed on Saturday, Sunday, and holidays at the rates specified in Schedule "A."

(Testimony of William S. Hibberd.)

General Counsel's Exhibit No. 5—(Continued)

Article VI.

Sec. 3. Travel: It is recognized by Employer and Union that further consideration should be given to the problems of transportation and travel on this Project because of the large area covered by it; it is agreed, therefore, that the amount and the mode of handling same for work within the barricaded area shall be left open for negotiation with the signatory unions prior to commencing construction in the barricaded area.

Sec. 4. Whenever the Employer or his authorized agent calls the Union for employees, and fails to put such employees to work, they shall be paid for two (2) hours call time at the regularly established rate. Any employee reporting for work on his regularly established day or shift, who has worked the previous day or shift, but is not put to work shall receive two (2) hours pay, or if put to work and works less than four (4) hours, he shall be paid for four (4) hours time at the regularly established hourly rate, unless he has been notified by his foreman upon or before the expiration of his previous day or shift not to report for work. Any employee reporting for work and who works more than four (4) hours but less than eight (8) hours shall be paid for eight (8) hours. Provided, however, that such failure to be put to work is not caused by actual inclement weather or breakdown of equipment.

(Testimony of William S. Hibberd.)

General Counsel's Exhibit No. 5—(Continued)

Sec. 5. When employees are required to stand by because of temporary breakdowns of machinery, shortage of material, temporary weather conditions, or for any other cause beyond their control, no time shall be deducted for this period nor shall the finishing time of day or shift be extended to make up for time lost.

Sec. 6. Holidays recognized by this Agreement shall be: New Year's Day, Memorial Day, Fourth of July, Labor Day, Armistice Day, Thanksgiving Day, and Christmas Day. Provided that no work shall be performed on Labor Day except to save life or property. If any of the above holidays fall on a Sunday, the following Monday shall be observed as the holiday.

Article VII. Disputes:

Sec. 1. It is not contemplated by any party hereto that there will be caused or permitted any lockout, or strike, or cessation, or slow-down of work, but instead, it is specifically provided that in the event that any disputes rise out of the interpretation or performance of this contract, same shall be settled by means of the procedure set out herein.

Sec. 2. In the event of disputes arising out of this Agreement or the application thereof, the offended party (whether it be the Union or the Employer), shall give notice of such dispute in writing, to the other party, and the following steps shall be immediately taken to adjust the dispute:

(Testimony of William S. Hibberd.)

General Counsel's Exhibit No. 5—(Continued)

First: The business representative of the Local Union and the foreman and/or superintendent shall endeavor to adjust the matter. But failing, it shall then be, within forty-eight (48) hours——

Second: Taken up directly by the Local Union and the Employer through their designated representatives; and failing here, the Local Union and the Employer shall——

Third: Each select two grievance committeemen, who shall be charged to, within five days, settle the matter; or

Fourth: Unanimously agree within five days upon a fifth disinterested person to be added to the committee. Any decision reached by majority vote of this committee of five shall be within the scope of this Agreement and must be rendered within twenty (20) days after the selection of the fifth member; such decision shall be final and binding.

Sec. 3. Jurisdictional Disputes: There shall be no cessation or interference in any way with any of the work of Employer by reason of jurisdictional disputes between the various Unions with respect to jurisdiction over any of the work covered by this Agreement. Such disputes shall be settled by the Unions themselves in accordance with the laws of the Building and Construction Trades Department of the American Federation of Labor.

(Testimony of William S. Hibberd.)
General Counsel's Exhibit No. 5—(Continued)

Article VIII. Other Employers and Other Employees:

Sec. 1. While this Agreement is not designed to cover others except members of the Union, it is nevertheless recognized that workmen other than members of the Union may be employed; therefore, as a guarantee that members of the Union shall not be expected to work with non-union workmen, it is mutually agreed that Unions affiliated with the Building and Construction Trades Department of the American Federation of Labor, not signatory to this Agreement may become signatory to this Agreement at a later date, and workmen so covered shall be or shall become members of their respective Union affiliated with the Building and Construction Trades Department of the American Federation of Labor.

Article IX. Health-Sanitation-Safety:

Sec. 1. The Employer and the Union shall comply with all accepted general safety standards and sanitary requirements, whether required by governmental regulations or the terms of this Agreement. The Employer and the Union agree that all foremen must take the required training in first aid as required by law.

Sec. 2. First aid kits shall be kept in handy places on the job at all times.

Sec. 3. Sanitary drinking cups shall be provided

(Testimony of William S. Hibberd.)

General Counsel's Exhibit No. 5—(Continued)

and cool drinking water must be kept in clean containers at all times.

Sec. 4. The Employer will furnish warm, dry change rooms of ample size, equipped with heat for drying clothes and with benches for use during lunch periods; these will be situated close to the site of work.

Article X. Miscellaneous Basic Conditions:

Sec. 1. Employees shall be paid on the job before quitting time on Thursday of each week for the full pay-week. When employees are laid off or are discharged, they shall be paid immediately. When employees voluntarily quit they shall be paid within twenty-four (24) hours. Cash, local checks or checks upon which there is no charge for exchange shall be the pay medium.

Sec. 2. Authorized representatives of the Union may visit the site of work with the consent of the Contractor, provided they do not interfere with the operation of the work. Any visiting on the job site shall be in strict compliance with the security regulations established for the Project.

Sec. 3. No Steward shall be discharged for the performance of his duties pertaining to Union affairs.

Sec. 4. No rules, customs, or practices shall be permitted that limit production or increase the time required to do any work. There shall be no limitation on or restriction of the use of machinery, tools, or other labor-saving devices.

(Testimony of William S. Hibberd.)

General Counsel's Exhibit No. 5—(Continued)

Article XI. Addenda:

Sec. 1. It is expressly understood and agreed that there is attached hereto wage scales and working rules as provided for in Schedule "A" as mutually agreed by the Employer and the Union, which addenda are by this reference made a part of this Agreement as though fully set forth in the body of the Agreement.

Article XII. Saving Clause:

Sec. 1. If any provision of this Agreement, or the application of such provision, shall in any court action, be held invalid, the remaining provisions and their application shall not be affected thereby.

Article XIII. Effective Date and Duration:

This Agreement entered into this sixteenth day of August, 1947, shall be effective on all work covered hereby, as of August 1, 1947, and shall remain in full force and effect until August 1, 1948, and from year to year thereafter for the life of the Contract between Employer and the General Electric Company above referred to, unless notice is given in writing by the Unions or the Contractor to the other party, not less than sixty (60) days prior to the expiration of any such annual period, of its desire to modify, amend, or terminate this Agreement, and in such case the Agreement shall

(Testimony of William S. Hibberd.)

General Counsel's Exhibit No. 5—(Continued)

be opened for modification, amendment, or termination, such as the notice may indicate at the expiration of the annual period within which the notice is given.

After receipt of any such notice, the parties shall begin negotiations within thirty (30) days.

RTICLE XIII. (Continu

The wage rates and provisions to be paid to the various classifications of work ereunder shall be as set out in Schedule "A," which wage rates, however, shall become ffective only after approval by the General Electric Company and the Atomic Energy ommission. The EMPLOYER agrees to promptly submit this contract for such approval nd to request that such rates be effective on all work performed hereunder, from nd after August 1, 1947, during the life of this contract.

Conversely each signatory Union reserves to itself the right to promptly withraw its acceptance of this AGREEMENT unless this Contract and that portion of chedule "A" submitted by said Union are approved by General Electric Company and he Atomic Energy Commission, as submitted herein, so as to permit EMPLOYER to comly therewith.

RTICLE XIV. ADDITIONAL SIGNATORIES:

Sec. 1. In addition to the UNIONS which have signed this AGREEMENT and become arties hereto on the date hereof, other UNIONS affiliated with the Building and Contruction Trades Department of the American Federation of Labor may, from time to time, ecome additional parties, and may have the benefits of this contract and assume the iabilities thereof by affixing their signatures hereto by their duly authorized repreentatives and attaching hereto their wage scales agreed to by the said UNIONS and ontractor.

IN WITNESS WHEREOF the parties have caused this contract to be executed by their uly authorized representatives.

FOR THE EMPLOYER	FOR THE UNION
UY F. ATKINSON COMPANY .A. JONES CONSTRUCTION COMPANY	International Laborers Union
By Roy H. Northcutt Vice President, Guy F. Atkinson Company	Robert B. Sheets
	Local Laborers 348
	Painters International
	J. W. Spurse
	J. W. Spurse Painters L.U. 42
	Carpenter Brotherhood
	Washington State Council of Carpenters
	Local 184
Guy J. Knapp Local 478 Plasterers & Cem. Finishers	G. W. Ezzman Int Union Oper Engineers
	International Teamsters 556 G. F. Dawson

98h

FOR THE EMPLOYER	THE UNION
[illegible]	Dist Rep. Sheet Metal Wkrs.
[illegible]	✓ E. P. Eilmes
	Wood Wire & Metal Lathers
	✓ Walter Turner
	General Organizer
	Bridge & Structural Ironworkers
	✓ J. J. Hurley
	✓ W. J. Matthews B.M. & P.d.R.
	United Association of the Plumbing and Pipefitting Industry of the United States and Canada
	✓ [illegible]

International Brotherhood of Boilermakers, Iron Shipbuilders, Welders and Helpers of America.

✓ By John Stender
John Stender, Bus.Agt.,Welders Local 541

✓ A.F.O'Neill A. F. O'Neill
Bus.Agt.,Boilermakers Loc.104

✓ Homer Parrish Homer Parrish
International Representative

Local Union #112 I.B.E.W.

✓ Wm Wiseman Bus. Mgr.

United Slate, Tile and Composition Roofers, Damp and Waterproofers Association

By
FRANK W. TWIBELL, Intl Rep.

By Frank W. Twibell
FLOYD PETERSON, Secy Local 331 Yakima Wash

By Floyd Peterson

Admitted November 4, 1948.

(Testimony of William S. Hibberd.)

GENERAL COUNSEL'S EXHIBIT No. 10

Guy F. Atkinson Company
and
J. A. Jones Construction Company
Richland, Washington

Layoff Card

Foreman: Turn this in with your Time Card marked in full.

Man's No.: 39-232.
Name: Chester H. Hewes.
Date of last day worked: 2/19.
Hrs.: 1327 (6) 2-20.
Reason: Union Request.

1. Quit ..... ☐ .....
2. Discharged ..... ☒ .....
3. Not Qualified ..... ☐ .....
4. Temporary Layoff... ☐ .....
5. Work Completed.... ☐ .....

Reason for Discharge: Drunkenness, Irregularity, Loafing, Insubordination, Trouble Maker, Refusing to take Orders. Please refer this man to the Time Office.

Do you Want This Workman Back Again?

Yes.....

No.....

Foreman's No.: 1-133. Name: .....

Admitted November 4, 1948.

(Testimony of William S. Hibberd.)

GENERAL COUNSEL'S EXHIBIT No. 11

(Copy)

International Association of Operating Engineers
Affiliated With the Amedican Federation of Labor

Hoisting and Portable Engineers
Local Unions Nos. 370, 370-A, 370-B, 370-C
A. A. Rossman, Business Mgr.
219 South Browne St., Spokane 8, Washington
Pasco, Branch Office
110 N. 2nd, Pasco, Washington

February 16, 1948.

Mr. D. Russell Gochnour, Labor Relations Manager,
Guy F. Atkinson Co. and J. A. Jones Construction Co.,
Richland, Washington.

Dear Mr. Gochnour:

I am requesting the removal of Chester R. Hewes, machine tool operator, from the Hanford Project. This man has absolutely failed in his financial obligation to this Local Union.

Thanking you for your cooperation and with kind personal regards, I am

Very truly yours,

/s/ RAY CLARKE,
Representative, Local 370,
Pasco, Branch Office.

RC:rs

(Testimony of William S. Hibberd.)

HEWES EXHIBIT No. 1

Construction-Collective Bargaining Agreement Hanford Works, State of Washington

This Collective Bargaining Agreement (hereinafter called Agreement) by and between Atkinson-Jones Construction Company, an affiliated member of the Associated General Contractors of America, Inc., presently party to a Subcontract with the General Electric Company, as Prime Contractor, and the U. S. Atomic Energy Commission, as Owner, to perform certain construction work at the Hanford Works, State of Washington (hereinafter called the Employer), and the several individual International Unions or Local Unions, signatory hereto, each being an affiliate of the Building and Construction Trades Department of the American Federation of Labor, and as such exercising craft jurisdiction over the territory wherein the Hanford Works are located (hereinafter called the Union), and each party hereto having executed this Collective Bargaining Agreement through representatives having power and authority so to do:

Witnesseth:

Article I.—Purpose

Sec. 1. The Employer has entered into a Subcontract with the General Electric Company, which company is in turn a Prime Contractor under the U. S. Atomic Energy Commission, as Owner. Under

(Testimony of William S. Hibberd.)

Hewes' Exhibit No. 1—(Continued)

the provisions of that Subcontract the Employer currently is engaged in supplying certain construction requirements of the General Electric Company in various areas located at the Hanford Works, State of Washington. In performing under this Subcontract the Employer requires, and will require, a large number of skilled craftsmen and workmen customarily found only among members of trade unions. It is the purpose of this Agreement to secure competent and capable workmen for the performance of the work undertaken by the Employer; to maintain a continuity of employment to workmen so secured; to insure amicable Labor-Management relations and, further to record the terms of Agreement with respect to rates of pay, hours of work and other conditions of employment arrived at through the process of collective bargaining.

Article II.—Parties

Sec. 1. For the purpose of this Agreement, the party Employer and each party Union shall be known by and referred to hereinafter as the Employer and the Union, respectively. The representatives of the Employer and the Union signing this Agreement hereby warrant and guarantee their authority to act for, bargain for and bind the Employer and the Union, respectively, signatory hereto.

* * *

(Testimony of William S. Hibberd.)

Hewes' Exhibit No. 1—(Continued)

Article IV.—Work Covered

Sec. 1. This Agreement shall cover all work performed by the Employer pursuant to its Subcontract with the General Electric Company, as Prime Contractor, under the U. S. Atomic Energy Commission, as Owner, for the construction of certain buildings, facilities and other items of work in connection with the Hanford Works, State of Washington. Because of the nature of the work being performed by the Employer, it is mutually understood that all Federal Labor Laws and Regulations applicable to heavy and special construction contracts for the Government, as Owner, are paramount to the terms and provisions of this Agreement.

Article V.—Recognition

Sec. 1. This Agreement shall govern the employment of workmen who are employed by the Employer within the recognized jurisdiction of the signatory Union as the same is defined by the Building and Construction Trades Department of the American Federation of Labor. The Employer hereby recognizes the Union as the sole and exclusive bargaining agent for workmen so employed, subject to the exclusions contained in Section 2 (11), (12), of the National Labor Relations Act, as amended.

(Testimony of William S. Hibberd.)

Hewes' Exhibit No. 1—(Continued)

Article VI.—Selection of Workmen

Sec. 1. The Employer agrees to establish an employment office in the City of Pasco, Washington, and all manual workmen required by him shall be hired through that office. The Employer shall hire only qualified and competent workmen to perform services required and recognized as within established craft jurisdiction, and such workmen, shall be procured from sources fully qualified to supply them. The Union agrees, when requested by the Employer, to furnish workmen who are qualified and competent to perform the work of their craft.

Sec. 2. It is mutually agreed that Unions affiliated with the Building and Construction Trades Department of the American Federation of Labor, not signatory to this Agreement may become signatory to this Agreement at a later date, and workmen so covered shall be or shall become members of their respective Union affiliated with the Building and Construction Trades Department of the American Federation of Labor subject to the operation of Article VII—"Union Security."

Article VII.—Union Security

Sec. 1. In the event the respective Union shall qualify and procure necessary authority as required by Sec. 8 (a) (3) of the National Labor Relations Act, as amended, then upon such qualification and

(Testimony of William S. Hibberd.)

Hewes' Exhibit No. 1—(Continued)

procurement of authority, the following provisions shall become effective:

(a) All workmen employed by Employer to perform work within the properly determined craft Jurisdiction of the respective Union, shall become members of Union on the 30th day, or immediately thereafter, following the beginning of their respective employment, or on the 30th day, or immediately thereafter, following the date of this Agreement, whichever is the later date, and shall thereafter maintain membership in good standing in Union as a condition of employment. Union shall notify Employer, in writing, of any workman, who, subject to the foregoing provisions is claimed to be not in good standing and such notification shall be presented at least five (5) working days before requesting the discharge of any such workman.

Sec. 2. If and when the provision set forth in Sec. 1 of this Article VII shall become effective, Employer shall thereafter fully cooperate with Union in the enforcement of such union shop provision.

Sec. 3. Until completion of the 30-day period described in Section 1 of this Article, non-union workmen may be discharged or disciplined at the sole discretion of the Employer.

Sec. 4. The Employer agrees to keep the re-

(Testimony of William S. Hibberd.)

Hewes' Exhibit No. 1—(Continued)

spective Union fully informed regarding workmen hired and workmen terminated.

Sec. 5. A copy of Section 1-A and Sections 3 and 4 of this Article shall be furnished by the Employer to each workman hired under the terms hereof.

Sec. 6. In the event the National Labor Relations Act, as amended by the Labor Management Relations Act of 1947 should be further amended by the Congress or construed by the decision of the United States Supreme Court so as to exclude the construction industry from its operation and scope, or the National Labor Relations Board denies itself jurisdiction over the work covered hereby, during the life of this Agreement, Article VI—Selection of Workmen and this Article (Union Security) shall be deleted and in lieu thereof there shall be inserted as a substitute Article and made as a part of the basic Agreement the following described Article:

"Hiring and Employment of Workmen"

"Sec. 1. It is agreed that the Employer shall hire all employees coming under this Agreement through the office of the Union or through such other facility as may be designated by the Union; and such employees shall not be put to work unless and until they present a written referral signed by the proper official of the Union or other designated facility. But provided that in the event the Union

(Testimony of William S. Hibberd.)

Hewes' Exhibit No. 1—(Continued)

shall fail to furnish the needed employees within forty-eight (48) hours, the Employer shall be at liberty, without being deemed in violation of this Agreement, to hire them elsewhere; and provided, employees, so hired shall, before going to work, obtain clearance in writing from the Union. The Union agrees that such employees so hired may apply for and be admitted into membership under the regularly established procedure of the respective Union.

"Sec. 2. It is understood and agreed the Employer shall retain in employment only members in good standing of Union or those who have signified their intention of becoming members through the regularly established procedure of the Union.

"Sec. 3. While the Union assumes all responsibility for the continued membership of its members and the collection of membership dues, it reserves the right to discipline its members or those employees who have filed application to become members; and the Employer agrees to, upon written notice from the Union, release from employment any employees who fail to maintain membership in good standing or any employee who defaults in his obligation to the Union. It is understood the removal of and replacement of such employees shall not interfere with the operation of the job. Any other Articles or Sections of Articles in this Agreement inconsistent with this Article shall be deleted

(Testimony of William S. Hibberd.)

Hewes' Exhibit No. 1—(Continued)

from the Agreement in conformity with the intent of this Section."

* * *

Article XVIII.—General Saving Clause

Sec. 1. It is not the intention of either the Employer or the Union, party hereto, to violate any Federal laws, governing the subject matter of this Agreement. The parties hereto agree that in the event any provisions of this Agreement are finally held or determined to be illegal or void as being in contravention of any applicable law, the remainder of the Agreement shall remain in full force and effect unless the parts thereof so found to be void are wholly inseparable from the remaining portion of this Agreement. The article hereof relating to Union security is intended to be separable. Further, the Employer and the Union agree that if and when any or all provisions of this Agreement are finally held or determined to be illegal or void by the National Labor Relations Board, or on review by a court of final and competent jurisdiction, an effort will be made to then promptly enter into negotiations concerning the substance affected by such decision for the purpose of achieving conformity with the requirements of any applicable law and the intent of the parties hereto.

Article XIX—Effective Date and Duration

Sec. 1. This Agreement, entered into this ....

(Testimony of William S. Hibberd.)

Hewes' Exhibit No. 1—(Continued)

day of August, 1948, shall be effective on all work covered hereby as of August 10, 1948, and shall remain in full force and effect until August 10, 1949, and from year to year thereafter for the life of the Contract between Employer and the General Electric Company above referred to (subject to the exception created by Section 2 hereof), unless notice is given in writing by the Unions or the Employer to the other party, not less than sixty (60) days prior to the expiration of any such annual period, of its desire to modify, amend or terminate this Agreement and in such case the Agreement shall be opened for modification, amendment or termination such as the notice may indicate at the expiration of the annual period within which the notice is given. The parties shall begin negotiations within thirty (30) days after receipt of this notice.

Sec. 2. Wage Negotiations: It is agreed that the wage scale set forth in Schedule "A" attached hereto may be renegotiated once during any Contract year covered by this Agreement. Either the Employer or the Union desiring to negotiate wages shall give the other party thirty (30) days notice of its intent so to do. The party receiving said notice shall be prepared to enter into negotiations within fifteen (15) days from the receipt thereof. The effective date for any change in wages or other payments resulting from such notification shall be a separate subject of agreement between the parties at that time.

(Testimony of William S. Hibberd.)

Hewes' Exhibit No. 1—(Continued)

Article XX.—Interpretation

This Agreement, with any Exhibits and the Schedules "A" attached hereto, which are subject to separate negotiations, contains all of the covenants and agreements between the Employer and the Union. Nothing outside of this Agreement shall modify, amend or add to its terms and provisions unless accomplished by the execution of a formal supplemental agreement, negotiated and executed by and between the parties hereto.

Admitted November 5, 1948.

Cross-Examination

By Mr. Gill:

Q. Do your records show any application by Mr. Hewes for his former job, or a similar job, after February the 18th, 1947?

A. No. We have no application blank in the records.

* * *

Q. (By Mr. Robbins): I believe in response to Mr. Gill's question regarding the hiring procedures followed by Atkinson-Jones you stated, Mr. Hibberd, that the Union introductory card received by the Union was a part of the respective manual employees files. Now, is that presently true today, as to new hirers?

(Testimony of William S. Hibberd.)

A. Not to all new hirers. Whenever we request men from the Unions, they do identify those men with a slip of some kind, each one of the Unions. However, it is not a requirement under the present labor contract.

Mr. Robbins: That is all. Thank you.

Mr. Gill: One question, if I may interrupt.

Q. (By Mr. Gill): In response to this last answer that you gave, is your answer applicable at all times since August 10, 1948? A. Yes.

* * *

WILLIAM J. KECK

a witness called by and on behalf of the National Labor Relations Board, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Walker:

Q. What is your name?

A. William J. Keck.

Q. Mr. Keck, you are an employee of the Respondent, are you? A. Yes, sir.

Q. And you hold the position of Superintendent of the Automotive Repair Shop of the Respondent?

A. Yes, I do.

Q. And you have held that position since before November 4, 1947, and at all times since?

A. September 29, 1947, I went to work.

Q. Are you acquainted with the charging party here, Mr. Chester R. Hewes? A. I am.

(Testimony of William J. Keck.)

Q. Did he enter the employment of the Company on or about November 4, 1947?

A. I couldn't exactly say at what time, but he came on the payroll due to the fact that before I got the shop set up there were several men hired and farmed out in different departments around the field.

Q. Did Mr. Hewes work in your automotive repair shop under your direction? A. Yes.

Q. During all the time he worked there, were you familiar with his work? A. I was.

Q. During all the time he worked there, was his work competent and satisfactory to the Company?

A. It was.

* * *

JAMES J. MOLTHAN

a witness called by and on behalf of Guy F. Atkinson Company and J. A. Jones Construction Company, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Robbins:

Q. Will you state your full name for the record?

A. James J. Molthan.

Q. And your profession?

A. I am an attorney.

Q. You were employed by Atkinson-Jones. Will you explain in what capacity and for what period of time?

(Testimony of James J. Molthan.)

A. Beginning 31 October, 1948, I was employed by the Guy F. Atkinson Company and the J. A. Jones Construction Company in their Richland operations where they do business as Atkinson-Jones, joint venturers, and continued in that employ under the title of Manager of the Contract and Claims Section of the Atkinson-Jones enterprise until date 24 September, 1948.

Q. I beg your pardon. Was that first date that you expressed 1947 or 1948?

A. If I said '48, it should be 31 October, 1947.

Q. In that capacity were you a member of the management group of Atkinson-Jones?

A. The position I occupied was regarded as an executive position by the local management of Atkinson-Jones, and I—it would be best described, as far as pure legal matters were concerned, as an administrative assistant to the General Manager.

Q. Now, in that position did you have recourse to all of the files of the joint venture?

A. I had recourse to the files of all departments.

Q. Whenever the need arose for you to review them? A. That is correct.

Q. Did you also have a hand in the formulation of policy?

A. General policy that took in relationships of any type would see my office, and myself as the individual concerned, consulted in the formulation of the policy.

Q. Would that category include labor relations, labor policy?

(Testimony of James J. Molthan.)

A. All matters relating to the application of any Federal or State statute to the labor relations of Atkinson-Jones on the Richland job would be referred to me.

Q. I have a copy of General Counsel's Exhibit No. 5. I believe you have a copy available, Mr. Molthan. Will you tell me if you recognize that? That purports to be a contract with certain unions of the Building and Construction Trades Council in Pasco.

A. I have been handed a photostatic copy of what I know to be a collective agreement negotiated by and between the Guy F. Atkinson Company and the J. A. Jones Construction Company and several component unions of the Pasco Building and Construction Trades Council with certain other International Unions affiliated to the Building and Construction Trades Department of the American Federation of Labor. The exhibit was executed between the parties on the 16th day of August, 1947, with the effective date being 1 August, 1947.

Q. Are you competent because of your knowledge of the files of the Atkinson-Jones joint venture and because of personal knowledge surrounding the work out of this contract to testify both as to the circumstances surrounding its inception——

A. I believe I am competent to describe the manner in which the contract was negotiated and executed by and between all parties.

Q. Yes. I would refer you to General Counsel's Exhibits Nos. 11 and 12—I believe those are cor-

(Testimony of James J. Molthan.)

rect—which purport to be two letters received by Mr. Gochnour under date of February 16th from Mr. Clarke.

A. I am familiar with the letters. One letter, which contains a description of a group of members of the Operating Engineers, Local 370, under date of 16 February, was received by Mr. Gochnour, then the Labor Relations Manager of Atkinson-Jones, and by him referred to me for an opinion. In reviewing the letter I felt the Union request contained therein was beyond the scope of the collective agreement we had signed and advised the Labor Relations Manager we would take no action.

The letter called for us to go out and contact various individuals, allegedly members of the Operating Engineers, with a view of telling them that if they didn't pay their dues we were going to discharge them. We were under no contractual obligation to do that on behalf of the various Unions with whom we were dealing at that time.

I believe then the letter was recalled by the Operating Engineers and a second letter was directed to our Labor Relations Department on the same date, February 16, 1948, wherein the Union requested the removal of the complainant by name.

My present recollection is, we received several letters on that date where other individuals were named by the Operating Engineers' Union as being in default on obligations allegedly incurred by the employee of Atkinson-Jones to that local union.

As a result of this letter of February 16th de-

(Testimony of James J. Molthan.)

manding the removal from our payroll of the complainant, Chester R. Hewes, I caused to be initiated a complete investigation surrounding the circumstances of Mr. Hewes, his affiliation to the Operating Engineers' Union. I demanded documentary proof from the Local representatives—by Local I mean the Pasco representatives of Local 370—first, that Mr. Hewes was in fact a member of that union; secondly, that Mr. Hewes was actually in default insofar as any obligation he might have growing out of that membership to that union was involved.

It developed they were able to make a showing that Mr. [109] Hewes had applied for and been accepted into membership by Local 370; that thereafter he had defaulted in financial obligations toward that Union. It was because of this default that they regarded him as not being in good standing, allegedly, and demanded that we discharge him.

The collective agreement which has been referred to as General Counsel's Exhibit No. 5 saw the Atkinson-Jones concern assume an obligation growing out of Article IV, Sections 1, 2 and 3, thereof, wherein upon receipt of written notice from any of the signatory unions that a member of those unions was not considered in good standing, or defaulted in any of his obligations to those unions, the employer agreed to discharge him from his payroll.

It was this article, specifically Section 3 of the article, upon my review that compelled me to the

(Testimony of James J. Molthan.)

conclusion that we had no alternative in view of our collective agreement but to discharge Mr. Hewes and various other members of Local 370 who were in default, and the Local Union was able to establish the fact of that default.

So for that reason, and because of the operation of that article, and relying upon the fact that we did have this collective agreement with Local 370, we discharged Mr. Hewes from our payroll.

* * *

Cross-Examination

By Mr. Walker:

Q. Mr. Molthan, do you know whether at the time negotiations were going on, looking toward what was eventually executed as—and identified as General Counsel's Exhibit No. 5, whether the representatives of Atkinson-Jones requested of Operating Engineers any submission of any evidence of claim of representation?

A. Categorically, no. Could I enlarge a little on that statement?

Q. All right.

A. We felt, as members of the Associated General Contractors, with all the unions signatory to Exhibit No. 5—may I explain the labor policy somewhat in the execution of these construction type contracts?

At the time we went into this—it was actually, I think, the 28th of July—we were advised that we

(Testimony of James J. Molthan.)

had been awarded a contract by General Electric Company.

They set up the scope of our work, originally under the letter order, as $8,000,000 of construction, which called for the establishment—or, rather, the erection of a series of residential units in the City of Richland, and the construction of the construction camp area in North Richland.

That was our project at the time we negotiated the present contract which is under attack here.

We relied upon the Building Trades Department of the American Federation of Labor to man that job.

When we came into the Hanford area, we had no Associated General Contractors area agreement for our purpose. Ordinarily the Associated General Contractors will negotiate area agreements and then members coming into the area to do any kind of work, build a dam, a highway or a tunnel, avail themselves of that agreement. The Spokane Chapter of the Associated General Contractors exercises what, I imagine, a Union would term jurisdiction over the area in which the Hanford Works are set up. They had no agreement for our purposes, so it was necessary for us to negotiate an agreement, and we went into the—to the International Unions with whom we always do our business and asked through the agency of Mr. Harry Aimes, who is Executive Secretary of the Washington State Department of the Building Trades and Construction Department of the American Federation of

(Testimony of James J. Molthan.)

Labor, to arrange for our meeting with all the representatives, International or Local, that could be made available to us on short notice.

He set up the Unions that were represented at a series of negotiations that began in Spokane on the 14th day of August, 1947, and ended on the 16th day of August, 1947, with an agreement upon General Counsel's Exhibit No. 5.

Our representatives were Mr. Ray Northcutt and Mr. Don Grant.

I will identify Mr. Don Grant as secretary of the Guy F. Atkinson Company.

Other persons representing General Electric or the Government were there, but not negotiating. They were there merely to observe the negotiations.

There was considerable urgency about getting the work started at Hanford at that time. [129]

We did not ask for any of the Unions that signed this agreement to make a showing that they, in fact, represented persons employed by Atkinson and Jones because actually we had no employees. It is customary in the construction industry to get your working agreement settled, your wage rates settled through the area agreement, if possible, or set up a special job agreement, as we were required to do at Hanford, and then rely upon the unions signatory to man the job.

We were able to do this prior to the application of the Labor-Management Relations Act of 1947, to the heavy construction and specialized construction industry.

(Testimony of James J. Molthan.)

Now that that Act is effective, we had to abandon that practice and the present collective agreement in effect at the Hanford Works is substantially different.

In August of 1947, we followed our traditional pattern, and there was no question raised as to whether or not the unions represented employees, because what we were buying was the Unions' personnel that they were going to secure to man the contract.

Q. Was there any discussion with the Engineers during that negotiation relative to an appropriate collective bargaining unit?

A. The unit in the construction industry prior to the application of the Taft-Hartley Act was the creature of the asserted jurisdiction of the Unions. I might say categorically that it has always been troublesome because the Unions are never in agreement as to what their jurisdiction may or may not be and occasionally the employer finds himself caught in the bight of the line in trying to determine which has jurisdiction, but prior—at the time we accepted the established jurisdiction of the Unions and prayed that possibly that jurisdiction would persevere through the life of the contract without too much difficulty.

But we never set up a unit as such.

* * *

Q. (By Mr. Eagen): Mr. Molthan, handing you what has been marked for identification as Hewes 1, will you state what that is? If you know.

(Testimony of James J. Molthan.)

A. This is a copy of the present collective agreement between Atkinson-Jones and the Unions signatory thereto.

The exhibit as handed me does not have the signature pages attached to it, and to have a complete collective agreement we would have to have the schedule "A" referred to in Article XIX, Section 2. That schedule is in the process at the present time of being approved by the prime contractor and the Atomic Energy Commission as to whether or not the cost plus a fixed fee contractor will be allowed to pay them.

That is a requirement that is peculiar to the Government type of contract there and it may be some time before the entire contract will be complete in respect to Schedule "A."

The language here is the sole language that governs the contractual relationship between any Unions signatory thereto and Atkinson-Jones at the present time.

Q. Local 370 is one of the parties signing the agreement?

A. They were one of the parties signing the agreement.

I would like to state—may I go off the record just a minute?

Trial Examiner Ward: Yes.

(Discussion off the record.)

Trial Examiner Ward: On the record.

Mr. Eagen: Mr. Examiner, the parties have

(Testimony of James J. Molthan.)

agreed that Hewes' 1 can be received in evidence with the understanding that Respondent will furnish a complete copy of the contract which is to be substituted for Exhibit 1 which does not have the last couple of pages attached to it, including the signatures.

Trial Examiner Ward: Very well, the Exhibit will be received pursuant to the stipulation.

The reporter is directed to return the exhibit when the Respondent provides him with a complete copy, which copy shall be marked Hewes' Exhibit 1 in evidence.

(Hewes' Exhibit 1 received in evidence.)

* * *

Q. Calling your attention to the Spokane negotiations of August 14th to 16th, 1947, which were consummated in General Counsel's Exhibits 5 and 6, being the agreement, was there at that time any urgency with respect to commencing immediate construction work under the document which was then being negotiated?

A. Once the letter order had been handed to Atkinson and Jones, a period of about six weeks of contract negotiations was terminated around the 28th of July. Then the demand was immediate and urgent that we go to work.

We had sat for six weeks in preliminary contract negotiations and the hour was running late. So we were supposed to have a functioning organization set up overnight, and we attempted to do it.

(Testimony of James J. Molthan.)

We had to make a showing that we had the personnel available and we had to make a showing that we had material to start work with and the administrative and executive personnel available.

Q. Because of that urgency for immediate construction, did A-J immediately proceed to secure workmen?

A. We started employing. I think our first—our non-manuals, we began to bring them up around the 29th of July.

Q. The very following day?

A. That is correct.

Q. A-J immediately proceeded to hire workmen in accordance with their contract with the prime contractor, G.E.?

A. I would like this record to show that the policy of contractors in construction is somewhat different than the production or the manufacturing employer.

When we have a job, a contract is awarded—for instance, take the construction of a dam. We might have on our permanent payroll maybe 300 people. These are the backbone of your organization. You will hang onto your superintendents. You will hang onto your qualified accountants and that, and you will keep them even though you may not have any work. Then you may get a contract by competitive bidding that will necessitate building an organization maybe of 30,000 people to swing the entire contract. And we start from scratch, but between jobs those people will be off our payroll and work

(Testimony of James J. Molthan.)

for other contractors, so we always have this—what they call the initial lag of getting a job started. We have got to start from our administrative nuclear group of key personnel and build up immediately to get the number of qualified persons of all types we may need for the performance of a given contract.

That was the case here. We have a big organization. Both Atkinson and Jones are amongst the nation's largest heavy construction contractors, but we have a lot of contracts and when we get a new one such as here, or the McNary job, we have to start building an organization as against the given contract.

Q. Now, did that policy which you have just explained continue uninterrupted at all times following July 29, 1947?

A. From July 29 to roughly, I would say, around the 10th of September we were trying to get together the nucleus of the working forces that now comprises the Atkinson-Jones organization, superintendents, key personnel, clerical and management, and enough men in the manual brackets to get the job going. Those were our objectives from about July 29th to September 10th. By September 10th organization began to take form.

Q. And included in those jobs you were seeking to acquire personnel with people performing work under the jurisdiction of Local 370?

A. Traditionally, as general heavy construction contractors, we rely for our main personnel in our

(Testimony of James J. Molthan.)

work on the Operating Engineers and the common laborers.

Q. And in connection with this job, would your payroll demands include craftsmen following the trade of Local 370 members as being among the first to be called?

A. That is right. You have to begin to prepare your soil for structures and that is generally work performed by the Operating Engineers.

Q. And at the time of these negotiations, and during the period there from August 14th to 16th, 1947, was A-J following the policy of securing persons following the occupations as covered by Local 370's jurisdiction for work?

A. Our anticipation when we went on the job was that we were going into a construction job nowise dissimilar from any other construction job that we had had prior experience with, and we relied on the Unions we thought we would need in setting up our job mapping requirements.

Q. And by reason of that necessity, did you, during that period of negotiations, have with Local 370 requests to furnish men?

A. I believe they were supplying us men even prior to having a contract. On August 16th we had members of the Operating Engineers on our payroll at the request of individual representatives.

Q. Now, during the course of those negotiations did representatives of Local 370 inform you and your associates that they were then supplying you members for this job under A-J and that it was a

(Testimony of James J. Molthan.)

policy of Local 370 to furnish men only under a closed shop or so-called Union shop conditions?

A. I don't know whether they informed us at that time. It is our experience that we have to give a closed shop as an inducement to any union. We have to give some form of Union security to the Union.

Q. Otherwise they won't man the job?

A. Otherwise there is no incentive to the Union to go looking all over the United States for men to do the work for us.

* * *

Q. (By Mr. Gill): Mr. Molthan, with respect to the construction activities of A-J as they commenced on July 29, 1947, what demands were there as far as A-J was concerned for manual employees?

A. Well, as I have stated, our project was an estimate of $8,000,000 worth of residential type construction and the preparation of a construction camp to house construction workers in North Richland, and the pattern of bargaining in the construction industry would indicate for that type of work that we would need carpenters, operating engineers and common laborers to get the job started.

Q. And in what quantities would you need those three separate crafts to get the job started?

A. Well, the need for them would be immediate, and the quantities on that—of course, this is subject to everybody's opinion, which is as good as mine, but we would at least need of the three crafts,

(Testimony of James J. Molthan.)

skilled, roughly a thousand men to get the thing properly going in all phases of it.

Q. And in respect to the Engineers, what would be the demand at the beginning?

A. There seems to be agreement among construction men that you could divide it up roughly 33⅓% between each of the three named labor groups.

* * *

Q. (By Mr. Gill): And as this preliminary work progressed would additional numbers of these crafts and additional numbers of other crafts be required?

A. That's correct, when you get into the finishing phases.

Your job starts, of necessity, by preparing your soil for the structure. We need the teamsters and we need the Operating Engineers for that. The earth moving requires that.

Q. About how many weeks would you have that demand for approximately 1,000 men, of those three categories?

A. Well, the employment graph that has been introduced here as General Counsel's Exhibit No. 2, and there is a series there, will show a slight leveling off in our employment policy beginning around the 10th of September and continuing for the balance of the month of September, 1947. And the actual number of men required, I don't feel that I am too competent to testify to. That is a phase of construction that is——

Q. Well, with respect to the thousand men, if I

(Testimony of James J. Molthan.)

understand you correctly, you would need them as fast as you could get them?

A. That is right, the need is urgent.

Q. If you could have gotten a thousand men in the first few days following July 29th, you would have work available for them to do?

A. If we had—if we knew that we could operate without the Unions in the west, let us say, and could have gone to Seattle and got a thousand men in those classifications, free of any union pattern, we undoubtedly would have gone right into Seattle and brought them around the 1st of August and could have done it.

Q. You could have had work available for them the first of August, for a thousand men?

A. Yes. Our experience as western contractors is, of course, that we have to go to the unions on this type of work.

Q. By reason of the long experience you have had in this type of work, and the long experience of the two separate corporate contractors who amalgamated in the joint venture, are you acquainted with the sources of manpower to supply that original demand of a thousand men and subsequent demands? A. I am; yes, sir.

Q. What are the facts with regard to the available pools?

A. In the State of Washington the construction contractor goes directly to the construction department—to the construction unions for his manpower. That has been a condition that has existed since approximately 1928, or thereabouts.

(Testimony of James J. Molthan.)

Q. Are you referring to the affiliated unions of the International Unions belonging to the Building Trades Department of the A. F. of L.?

A. They are the Unions we rely upon to supply our requirements in this State.

Q. Are there any other sources of manpower to supply these demands which you have described other than the affiliated unions of the Building Trades Department of the A. F. of L.?

Mr. Eagen: I object to that. I think that is far afield from any issue involved in this case.

Trial Examiner Ward: We have gone a little far afield on a number of occasions. He may answer. Let us make it brief along this line.

Mr. Gill: Yes.

A. The only other conceivable source would be the Washington State Employment Service and they, in turn, go to the Unions to get the men, so I can't say I know of any other manpower sources in this State.

* * *

Redirect Examination

By Mr. Robbins:

Q. Can you say that the reason a letter order was used in the instance of letter order Subcontract G-133 was because of the urgent need to commence work?

A. Housing was acute and it was a matter of prime concern to the Atomic Energy Commission to build residential structures to accommodate con-

(Testimony of James J. Molthan.)

struction people, the single men that they knew they were going to hire and also members of the Commission and General Electric residing at Richland. And on July 25th there were no plans drawn and the contractor went in, under cost-plus conditions, to perform such work as he would be directed to do—without plans, without specifications and with a rather dim knowledge on the part of all concerned as to what was going to be accomplished under the terms of the letter order.

That's why I say the estimate was $8,000,000, and we knew we were going to do residential type construction, and we were going to build a construction camp.

But we didn't even have plans to work on.

Q. Well, did Atkinson-Jones begin to man its job and start construction work to the extent of its ability immediately upon receipt of an executed letter order?

A. That was the purpose of giving us the letter order, to get us into performance as quickly as possible.

* * *

CHESTER R. HEWES

a witness called by and on behalf of the National Labor Relations Board, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Walker:

Q. You are Chester R. Hewes? A. I am.

(Testimony of Chester R. Hewes.)

Q. And where do you reside?

A. Yakima.

Q. Were you ever in the employ of Guy F. Atkinson and J. A. Jones Construction Company?

A. I was.

Q. When did your employment begin there?

A. I believe it was around the 4th of November.

Q. Before going on your employment, did you make inquiries about being employed there?

A. I was down there the last part of October in '47, and I went into the personnel office.

There were a lot of men lined up at the door. I had to wait there a long time, and I asked them if they needed any machinists and they told me that—they referred me to the Operating Engineers at Pasco. They said it was a closed job—a closed shop.

Q. Now, who told you that?

A. Well, I can't recall who it was. It was a man who used to come out on the platform there and take the applicants inside.

Q. I do not mean the man's name, but was he a man connected with the employment department of Respondent? A. I imagine he was, yes.

Q. Then after you were told that, what did you do?

A. I went on down to Pasco to the Operating Engineers' office.

Q. Are you a member of any labor organization?

A. I.A.M., International Association of Machinists.

(Testimony of Chester R. Hewes.)

Q. How long have you been a member?

A. Oh, I imagine it's about 16 or 18 years.

Q. Were you a member of International Association of Machinists on or about the latter part of October, 1947? A. I was.

Q. Was anything said by you to the employment representative of the Respondent about your membership in the I.A.M.?

A. Well, it seems to me I did ask them if I could go to work there on my card, and they told me that the Operating Engineers had the contract and they referred me down to them at Pasco, or something to that effect.

Q. Was anything said to you to the effect that you could not be employed there without being referred to the Engineers?

A. He told me that the Operating Engineers had the contract.

Q. What did you do after you left the employment office? A. I went into Pasco.

Q. And where in Pasco did you go?

A. I went to the Labor Temple in Pasco, and there were some men in there and I couldn't get up to the door.

So I waited around there two or three hours and finally I contacted Mr. Clarke and I asked him if they needed any machinists, and they asked me right in ahead of a lot of men and they asked me if I was a machinist, and I showed my book.

Q. What book?

(Testimony of Chester R. Hewes.)

A. My machinists' book, International Association of Machinists dues book.

Q. O.K.

A. And he seemed to be satisfied I was a machinist. He asked me no further questions and he said that I would have to turn in my book in order to join the Operating Engineers to go on the job. And I told him I wouldn't do that.

He said—before that he told me that they would allow me 60% on my book, that is, I presume, the dues were $100 and they would allow me $60 for my book and I pay $40, which would entitle me to membership.

But I would not turn in my book, and I believe I came back home then.

And I went down again in a few more days—I don't remember how many more days—and I contacted him again and he——

Q. By "him," you mean who?

A. Mr. Clarke.

Q. Can you give us what position Mr. Clarke has with the Engineers?

A. He is the business agent, I presume.

Q. All right.

A. And he invited me in again and he—we talked it over and he wanted my book again. And I asked him why I couldn't go to work out there, being a machinist, and why I couldn't go to work on a permit.

Well, it seems like Ray seemed to think that

(Testimony of Chester R. Hewes.)

would be all right if he was running the show, but he wasn't running the show.

He talked to me like he believed in real unionism, and I thought quite a bit of him for that, but he was not running the show.

So he told me, "I will go you one better. You keep your book and we will charge you $40 and you go to work."

So he issued me a card of introduction, but I did not pay him the $40.

* * *

Q. During the time you were employed by Respondent, did you work in the 3,000 Area machine shop? A. I did.

Q. And for the sake of brevity, was the work you did there that which was described by Mr. McBurnie and Mr. Keck in their testimony?

A. I was doing machinist work in that shop.

Q. How long did you continue on the job with Respondent?

A. I left there on February the 19th, I believe.

Q. On February the 19th what happened?

A. About nine o'clock in the morning, on the 18th, the timekeeper came in and handed me a layoff card.

Q. I hand you what has been marked as General Counsel's Exhibit No. 10 and ask you if that is a photostat copy of the card handed to you at that time?

A. Well, it doesn't look like the same one. There is a photostatic copy of the original. I took it into

(Testimony of Chester R. Hewes.)

Pasco and had a photostatic copy made of it. The only difference I see is that Russell Gochnour signed this one.

Q. Yes.

A. It means the same thing, I guess.

Q. The lay-off card you received bears on its face all of the entries which appear on General Counsel's Exhibit 10 except that portion which is set out on General Counsel's 10 beginning with the word "reason." That portion does not appear on the card given to you, is that correct?

A. That's right.

Q. Otherwise, on the card delivered to you, the reason for discharge is marked as "Union request"? A. That's right.

Q. And the date is February the 19th, the same date? A. The same thing.

Q. No other reason was ever given to you for the discharge other than that which appears as the reason set out on General Counsel's Exhibit 10, is that correct?

A. None that I know of. It was a complete surprise to the superintendent, Mr. Keck. The timekeeper came right in the door and handed it to me. Mr. Keck knew nothing about it.

* * *

RAY CLARKE

a witness called by and on behalf of International Union of Operating Engineers, Local 370, A. F. of L., being first duly sworn, was examined and testified as follows:

Direct Examination

* * *

By Mr. Gill:

Q. The Union security clauses of the current agreement require N.L.R.B. authorization in the procedure commonly referred to as Union shop elections, and I will ask you if Local 370 has taken any steps in connection with that matter?

A. We have,—definitely.

Q. And what steps, briefly?

A. We have completed our obligation required by that section in filing nine separate petitions for such elections.

Q. On work that comes under the Hewes Exhibit No. 1? A. That is right.

Q. Have you consulted with any regional official of the 19th Region with respect to the processing of those petitions? A. I have, by——

Q. You can answer yes or no.

A. Yes, I have.

Q. And have you been given any advice as to when they will conduct the elections?

A. I have.

Q. What was that advice?

A. I was told in a group meeting by Mr. McClas-

(Testimony of Ray Clarke.)

key that perhaps sometime next spring they might be processed.

Q. Did the gentleman indicate to you that in the spring of 1949, they would or would not conduct those elections?

A. He didn't give a definite answer.

Q. You understand by that that the decision would be made in the spring of 1949?

A. That is right.

Q. Whether it was to conduct the election or to refuse to conduct the election?

A. One way or the other, it is my understanding.

Q. Are you familiar with the conduct of the National Labor Relations Board with respect to processing petitions for bargaining rights at this Hanford Project? Yes or no. A. Yes, I am.

Mr Eagen: Before you answer, Mr. Clarke, I object very strenuously to this line of questioning on the ground that the National Labor Relations Board is the best judge of its own procedures and its own petitions and its own actions and doesn't need any testimony on that score; and, also, that the Counsel knows and the Trial Examiner knows that it is customary, has been since the inception of the Board not to process petitions when there are outstanding charges which exist in the instant situation.

Trial Examiner Ward: The Examiner was curious as to what Counsel was attempting to prove by this line of testimony.

(Testimony of Ray Clarke.)

Mr. Gill: It is within the allegation of the fifth affirmative defense, as to which the motion to strike was denied.

Trial Examiner Ward: I suggest on that point that you make an offer of proof. Instead of attempting to prove by this witness what the policy of the Board is, or might be, make an offer of proof.

Mr. Gill: I can save a great deal of time by proposing this solution to the matter, that the Trial Examiner reserve as an Exhibit, to be identified as Local 370's Exhibit No. 4, for the purpose of containing a statement from Mr. Walker or any of his associates briefly summarizing all of the N.L.R.B. applications which have been filed concerning this Hanford Project and the action, if any, taken by the N.L.R.B. in connection with any of those petitions.

Mr. Walker: May I make an observation, Mr. Examiner?

Trial Examiner Ward: You may.

Mr. Walker: In view of the line of examination that has come up, I do not intend on cross-examination to go into this matter concerning representation or go into the matter concerning union shop elections for the reason that those subject matters are entirely extraneous to this unfair labor practice procedure in the first place, and in the second place, I am not in a position to say that the Board has declined to process either Union shop petitions or representation positions upon the ground and for

(Testimony of Ray Clarke.)

the reason exclusively that the Board will not accept jurisdiction over the work covered by the Respondent herein. That is a question of fact. Secondly, as a question of law, I can—and I don't intend to make anything further of this—the question of law, the assertion of jurisdiction by the Board over contracting work is already covered by the Board's decision in the Ozark Dam case which is precisely factually the same as the construction work being done here.

Trial Examiner Ward: The record will show Counsel's observation.

Mr. Gill: I am sorry, I didn't hear you.

Trial Examiner Ward: I say, the record will show the observation of Counsel.

Mr. Gill: Well, I would like to have a ruling as to whether such exhibits may be reserved for the purposes indicated.

Trial Examiner Ward: I beg your pardon?

Mr. Gill: I would like to have your ruling, Mr. Examiner, as to whether you will reserve Local 370's Exhibit No. 4 for the purpose of reciting the history of these petitions,—a very brief statement.

Trial Examiner Ward: For the purpose of reciting them?

Mr. Gill: Yes.

Mr. Walker: Well, just one moment. So that you will understand my position clearly, and if you feel the need for going into it on examination here and now, I think you should do so, but understand me, if you reserve that and attempt to prepare a

(Testimony of Ray Clarke.)

document after the close of this and expect me to join in on it, which document you are attempting to use to show that the Board has declined to assert jurisdiction over construction work, I tell you now that I will not join in it.

Mr. Gill: No; the purpose of the exhibit is to show, as I have already indicated, the N.L.R.B. petitions for the representation and for union shop that have been filed with the 19th Region covering the Hanford Project and the action, if any, that the Board has taken with respect thereto.

Mr. Walker: Then I object to it upon the ground that it is incompetent, irrelevant and immaterial. What has been filed with respect to Union security matters or with respect to representation matters is entirely extraneous to the issues presented in this unfair labor practice proceeding.

Trial Examiner Ward: Are you making this in the form of an objection?

Mr. Walker: I do, sir.

Trial Examiner Ward: I am going to sustain that. Make an offer of proof.

Mr. Gill: Very well, I will make an offer of proof by this witness and other witnesses who are not in attendance here that if they were permitted to testify they would state that on numerous occasions Local Unions——

Mr. Eagen: What local union? Local 370, you mean?

Mr. Gill: Local Unions who have supplied members on the Hanford Project and Unions which have

(Testimony of Ray Clarke.)

been designated as exclusive bargaining agencies by employees on the Hanford Project.

These Unions have filed numerous petitions for bargaining rights with the 19th Region of the N.L.R.B. on numerous and separate occasions and that no action was taken by the N.L.R.B. with respect to said petitions except to state that the said matters had been referred to Washington, D. C., and thereafter, in response to inquiry, further responses, that nothing further had been heard and that there were numerous repeated requests for knowledge as to what action had been taken, with the further advice that the matters had been referred to Washington, D. C., and that there had been no further instructions with respect to the N.L.R.B. conducting any of those hearings and elections necessary to determine representation questions; that that policy of the N.L.R.B. has been in existence at all times since the Hanford project has been in existence and that recently that policy has been applied to U. A. petitions with this modification, that the recent advice has been that Washington, D. C., will make a decision probably in the spring of 1949, but that it is not known what the decision will be, as to whether any union shop elections will be conducted or not.

That is my offer of proof.

Trial Examiner Ward: The record will show the offer. The ruling remains the same.

* * *

Q. Did you know the customs and practices in the building and construction trades industry in the

(Testimony of Ray Clarke.)

area covered by your Union as it was described by Mr. Hibberd, the geographical area with respect to the execution of a labor agreement covering wages, hours and working conditions in advance of the beginning of the construction work? Answer that yes or no.

A. Yes. I can elaborate, if necessary.

Q. What is the custom?

A. Well, for instance, it is now November 4th or 5th and we have already signed and sealed our labor agreement with the Associated General Contractors for the calendar year 1949, not knowing just what jobs will be covered by it.

Q. Now, has that also been true with respect to preceding contracts with the A.G.C.?

A. That is correct.

* * *

In the United States Court of Appeals
for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

GUY F. ATKINSON CO., and J. A. JONES CONSTRUCTION CO.,
Respondent.

CERTIFICATE OF THE NATIONAL LABOR RELATIONS BOARD

The National Labor Relations Board, by its Executive Secretary, duly authorized by Section 203.87, Rules and Regulations of the National Labor Relations Board—Series 5, as amended (redesignated Section 102.87, 14 F. R. 78), hereby certifies that the documents annexed hereto constitute a full and accurate transcript of the entire record of proceeding had before said Board, entitled, "In the Matter of Guy F. Atkinson Co., a corporation, and J. A. Jones Construction Co., a corporation d/b/a Guy F. Atkinson Co. and J. A. Jones Construction Co. and Chester R. Hewes, Case No. 19-CA-28," before said Board, such transcript including the pleadings and testimony and evidence upon which the order of the Board in said proceeding was entered, and including also the findings and order of the Board.

Fully enumerated, said documents attached hereto are as follows:

(1) Order designating Peter F. Ward, Trial

Examiner, for the National Labor Relations Board, dated November 4, 1948.

(2) Stenographic transcript of testimony taken before Trial Examiner Ward on November 4 and 5, 1948, together with all exhibits introduced in evidence.

(3) Respondent's letter, dated November 10, 1948, requesting extension of time for filing brief before the Trial Examiner.

(4) Copy of Chief Trial Examiner's telegram, dated November 17, 1948, granting all parties extension of time for filing briefs.

(5) Copy of Trial Examiner Ward's Intermediate Report, dated May 12, 1949, (annexed to item 22 hereof); order transferring case to the Board, dated May 12, 1949, together with affidavit of service and United States Post Office return receipts thereof.

(6) Respondent's letter, dated May 24, 1949, requesting extension of time for filing exceptions.

(7) Letter from International Union of Operating Engineers, Local 370, hereafter called Union, dated May 24, 1949, requesting extension of time for filing exceptions and brief.

(8) Copy of Board's telegram, dated May 27, 1949, granting all parties extension of time for filing exceptions.

(9) Copy of Board's letter to Union, dated May 31, 1949, noting grant of extension of time for filing exceptions and briefs and denying request for further extension, together with affidavit of service

and United States Post Office return receipt thereof.

(10) Union's letter, dated June 2, 1949, requesting permission to argue orally before the Board.

(11) Respondent's letter, dated June 7, 1949, requesting permission to argue orally before the Board.

(12) Respondent's letter, dated June 23, 1949, requesting permission to submit supplementary exceptions.

(13) Copy of Respondent's exceptions to the Intermediate Report, received June 27, 1949.

(14) Copy of Union's exceptions to the Intermediate Report, received June 27, 1949.

(15) Copy of Board's telegram to Respondent, dated July 13, 1949, granting permission to file supplemental exceptions, together with copy of Board's letter to Respondent, dated July 15, 1949, to the same effect.

(16) Union's telegram, dated July 25, 1949, requesting extension of time and permission to argue orally before the Board.

(17) Copy of Respondent's supplemental exceptions, received July 26, 1949.

(18) Notice of hearing for the purpose of oral argument, issued by the Board on July 29, 1949, together with affidavit of service and United States Post Office return receipts thereof.

(19) Letter from International Union of Operating Engineers, dated August 5, 1949, requesting postponement of date of public hearing.

(20) Copy of Board's telegram, dated August 5,

1949, notifying all parties of postponement of oral argument.

(21) Notice of hearing for the purpose of oral argument, issued by the Board on December 5, 1949, together with affidavit of service and United States Post Office return receipts thereof.

(22) List of appearances at oral argument, dated December 19, 1949.

(23) Copy of Decision and Order issued by the National Labor Relations Board on June 8, 1950, with Intermediate Report annexed, together with affidavit of service and United States Post Office return receipts thereof.

(24) Respondent's motion for reconsideration of Decision and Order, received July 7, 1950.

(25) Union's petition for reconsideration of Decision and Order and for reopening the record, received July 19, 1950.

(26) Reply of Charging Party, Chester R. Hewes, in resistance to the two motions for reconsideration of Decision and Order, received August 10, 1950.

(27) Order denying Respondent's motion and Union's petition, issued by the Board on August 25, 1950, together with affidavit of service and United States Post Office return receipts thereof.

In Testimony Whereof, the Executive Secretary of the National Labor Relations Board, being thereunto duly authorized as aforesaid, has hereunto set his hand and affixed the seal of the National Labor

Relations Board in the city of Washington, District of Columbia, this 13th day of March, 1951.

[Seal] NATIONAL LABOR
RELATIONS BOARD,

/s/ FRANK M. KLEILER,
Executive Secretary.

[Endorsed]: No. 12880. United States Court of Appeals for the Ninth Circuit. National Labor Relations Board, Petitioner, vs. Guy F. Atkinson Co., and J. A. Jones Construction Co., Respondent. Transcript of Record. Petition for Enforcement of Order of the National Labor Relations Board.

Filed March 19, 1951.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 12880

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

GUY F. ATKINSON CO., and J. A. JONES CONSTRUCTION CO.,
Respondent.

PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

To the Honorable, the Judges of the United States Court of Appeals for the Ninth Circuit:

The National Labor Relations Board, pursuant to the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. Supp. III, Secs. 151 et seq.), hereinafter called the Act, respectfully petitions this Court for the enforcement of its order against Respondent, Guy F. Atkinson Co., and J. A. Jones Construction Co., and its officers, successors, and assigns. The proceeding resulting in said order is known upon the records of the Board as "In the Matter of Guy F. Atkinson Co., a corporation, and J. A. Jones Construction Co., a corporation, d/b/a Guy F. Atkinson Co., and J. A. Jones Construction Co. and Chester R. Hewes, Case No. 19-CA-28."

In support of this petition the Board respectfully shows:

(1) Respondent is a joint venture, composed of two corporations, engaged in business in the State of Washington, within this judicial circuit where the unfair labor practices occurred. This Court therefore has jurisdiction of this petition by virtue of Section 10(e) of the National Labor Relations Act, as amended.

(2) Upon all proceedings had in said matter before the Board as more fully shown by the entire record thereof certified by the Board and filed with this Court herein, to which reference is hereby made, the Board on June 8, 1950, duly stated its findings of fact and conclusions of law, and issued an order directed to the Respondent, and its officers, successors, and assigns. The aforesaid order provides as follows:

Order

Upon the entire record in the case and pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Guy F. Atkinson Co. and J. A. Jones Construction Co., and its officers, successors, and assigns shall:

1. Cease and desist from:

(a) Recognizing International Union of Operating Engineers, Local 370, A.F.L., or any successor thereto, as the representative of any of its employees for the purposes of dealing with the Respondent concerning grievances, labor disputes, wages, rates of pay, hours of employment, or other

conditions of employment unless and until said organization shall have been certified by the National Labor Relations Board;

(b) Performing or giving effect to its contract of August 16, 1947, with International Union of Operating Engineers, Local 370, A.F.L., or to any modification, extension, supplement, or renewal thereof or to any other contract, agreement, or understanding entered into with said organization relating to grievances, labor disputes, wages, rates of pay, hours of employment, or other conditions of employment, unless and until said organization shall have been certified by the National Labor Relations Board; excepting, however, that in no event shall this be construed as waiving any provisions of Sections 8 and 9 of the Act, as amended;

(c) Discouraging membership in International Association of Machinists or in any other labor organization of its employees or encouraging membership in International Union of Operating Engineers, Local 370, A.F.L., by discharging or refusing to reinstate any of its employees, or in any other manner discriminating in regard to their hire and tenure of employment or any term or condition of their employment;

(d) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form labor organizations, to join or assist International Association of Machinists, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in

concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8(a)(3) of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Offer to Chester R. Hewes immediate and full reinstatement to his former or substantially equivalent position, without prejudice to his seniority and other rights and privileges;

(b) Make whole Chester R. Hewes for any loss of pay he may have suffered as a result of the Respondent's discrimination against him by payment to him of a sum of money equal to the amount he normally would have earned as wages from the date of his discharge to the date of the Respondent's offer of reinstatement, less his net earnings during said period;

(c) Post at its plant in Richland, Washington, copies of the notice attached hereto, marked Appendix A.[16] Copies of said notice, to be furnished by the Regional Director for the Nineteenth Region, shall, after being duly signed by the Respondent's

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[16]In the event this Order is enforced by a decree of a United States Court of Appeals, there shall be inserted in the Notice, before the words "A Decision and Order," the words "A Decree of the United States Court of Appeals Enforcing."

representative, be posted by the Respondent immediately upon receipt thereof and maintained by it for sixty (60) consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material;

(d) Notify the Regional Director for the Nineteenth Region in writing, within ten (10) days from the date of this Order, what steps the Respondent has taken to comply herewith.

(3) On June 8, 1950, the Board's Decision and Order was served upon Respondent by sending a copy thereof postpaid, bearing Government frank, by registered mail, to Respondent's counsel.

(4) Pursuant to Section 10(e) of the National Labor Relations Act, as amended, the Board is certifying and filing with this Court a transcript of the entire record of the proceeding before the Board, including the pleadings, testimony and evidence, findings of fact, conclusions of law, and order of the Board.

Wherefore, the Board prays this Honorable Court that it cause notice of the filing of this petition and transcript to be served upon Respondent and that this Court take jurisdiction of the proceeding and of the questions determined therein and make and enter upon the pleadings, testimony and evidence, and the proceedings set forth in the transcript and upon the order made thereupon as set forth in paragraph (2) hereof, a decree enforc-

ing in whole said order of the Board, and requiring Respondent, and its officers, successors, and assigns, to comply therewith.

NATIONAL LABOR
RELATIONS BOARD,

By /s/ A. NORMAN SOMERS,
Assistant General Counsel.

Dated at Washington, D. C., this 13th day of March, 1951.

Appendix A

Notice to All Employees Pursuant to a Decision and Order

of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby notify our employees that:

We Will withdraw and withhold all recognition from International Union of Operating Engineers, Local 370, A.F.L., as representative of any of our employees at our Richland, Washington, plant, for the purposes of dealing with us concerning grievances, labor disputes, wages, rates of pay, hours of employment, or other conditions of employment, unless and until said organization shall have been certified by the Board as the representative of such employees.

We Will cease performing or giving effect to our contract of August 16, 1947, with International Union of Operating Engineers, Local

370, A.F.L., covering employees at our Richland, Washington, plant, or to any modification, extension, supplement, or renewal thereof, or to any other agreement contract, or understanding entered into with said organization relating to grievances, labor disputes, wages, rates of pay, hours of employment, or other conditions of employment, unless and until said organization shall have been certified by the Board, excepting, however, that in no event shall this be construed as waiving any provisions of Sections 8 and 9 of the Act as amended.

We Will Not in any like or related matter interfere with, restrain, or coerce our employees in the exercise of their right to self-organization, to form labor organizations, to join or assist International Association of Machinists, or any other labor organization, to bargain collectively through representatives of their own choosing, to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities, except to the extent that such right be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8(a)(3) of the Act.

We Will offer to Chester R. Hewes immediate and full reinstatement to his former or substantially equivalent position, without prejudice to any seniority or other rights and privileges previously enjoyed; and we will make

him whole for any loss of pay suffered as a result of the discrimination against him.

GUY F. ATKINSON AND J. A. JONES CONSTRUCTION CO.,
Employer.

Dated.....

By .....,
Representative. Title.

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

[Endorsed]: Filed March 17, 1951.

[Title of Court of Appeals and Cause.]

STATEMENT OF POINTS RELIED UPON BY THE BOARD

To the Honorable, the Judges of the United States Court of Appeals for the Ninth Circuit:

Comes now the National Labor Relations Board, the petitioner herein, and, in conformity with the rules of this Court, files this statement of points upon which it intends to rely in the above-entitled proceeding:

1. The Board properly determined that respondent's operations affected commerce within the meaning of the Act and that rspondent therefore was subject to the jurisdiction of the Board.

2. The Board properly found that respondent by discharging employee Chester R. Hewes violated Section 8(a)(3) and (1) of the Act.

3. The Board properly found that respondent in violation of Section 8(a)(1) of the Act rendered illegal assistance to Local 370, International Union of Operating Engineers, A.F.L.

4. The Board's order is valid and proper.

Dated at Washington, D. C., this 13th day of March, 1951.

/s/ A. NORMAN SOMERS,
Assistant General Counsel, National Labor Relations Board.

[Endorsed]: Filed March 17, 1951.

[Title of Court of Appeals and Cause.]

STATEMENT OF NATIONAL LABOR RELATIONS BOARD WITH RESPECT TO PETITION FOR ENFORCEMENT OF ITS ORDER AGAINST RESPONDENT

The National Labor Relations Board, petitioner herein, files this statement in connection with its petition herein for enforcement of its order issued against respondent.

1. Paragraphs 1(a) and (b) of the Board's order, as more fully set forth in the Board's petition provide that respondent cease and desist from recognizing International Union of Operating En-

gineers, Local 370, A.F.L., as the representative of any of its employees for collective bargaining purposes, and from giving effect to a contract dated August 16, 1947, between respondent and said union, or any modifications or renewal thereof, unless or until said International Union of Operating Engineers, Local 370, A.F.L., shall have been certified by the Board.

2. On September 19, 1950, after the issuance of the order referred to above, the Board in proceedings identified on the Board's records as Matter of Guy F. Atkinson Company and J. A. Jones Construction Company, d/b/a Atkinson-Jones Construction Company, and International Union of Operating Engineers, Local No. 370, A. F. of L., Case No. 19-RC-646, duly certified said International Union of Operating Engineers, Local 370, A.F.L., as the collective bargaining representative of:

> All employees at the Hanford Works, of Guy F. Atkinson Company and J. A. Jones Construction Company, d/b/a Atkinson-Jones Construction Company, North Richland, Washington, who are engaged in supervising, controlling, dismantling, erecting, operating, repairing and maintaining all hoisting and portable machines and construction machinery and equipment, within the recognized craft jurisdiction of the International Union of Operating Engineers, excluding supervisory, clerical, plant protection and professional employees of the employer and all employees regularly work-

ing at the employer's "White Bluffs Machine Shop," and all other employees of the employer, * * *

3. Said certification satisfies the condition set forth in paragraphs 1(a) and (b) of the Board's order herein insofar as the order applies to the employees covered by said certification and the order is therefore no longer a bar to respondent's engaging in collective bargaining with said union as the bargaining representative of the employees covered by said certification.

4. Paragraphs 1(a) and (b) of the Board's order continue to be operative insofar as they enjoin respondent from recognizing said union as the collective bargaining representative of any employees of respondent, other than those covered by said certification, until or unless the Board certifies the union as their bargaining representative.

5. Under established procedures, the Board's order normally is entitled to judicial enforcement, without regard to intervening circumstances, since an enforcement decree speaks as of the date of the issuance of the order. However, to avoid misunderstanding, particularly among the employees in question, it is appropriate, and the Board hereby consents thereto, that the enforcement decree prayed for in its petition and the notice be posted recite that the condition stated in paragraphs 1(a) and (b) has been met with respect to the employees covered by the certification referred to above.

The Board prays this Honorable Court that it

cause notice of the filing of this statement to be served upon Respondent.

NATIONAL LABOR
RELATIONS BOARD,

By /s/ A. NORMAN SOMERS,
Assistant General Counsel.

Dated at Washington, D. C., this 22nd day of March, 1951.

[Endorsed]: Filed March 26, 1951.

[Title of Court of Appeals and Cause.]

ORDER TO SHOW CAUSE

United States of America—ss.

The President of the United States of America
To: International Union of Operating Engineers, Local 370, Att.: Mr. L. Presley Gill, 2800 First Avenue, Seattle, Washington.

Greeting:

Pursuant to the provisions of Subdivision (e) of Section 160, U.S.C.A. Title 29 (National Labor Relations Board Act, Section 10(e)), you and each of you are hereby notified that on the 19th day of March, 1951, a petition of the National Labor Relations Board for enforcement of its order entered on June 8, 1950, in a proceeding known upon the records of the said Board as

"In the Matter of Guy F. Atkinson Co., a

corporation, and J. A. Jones Construction Co., a corporation, doing business as Guy F. Atkinson Co., and J. A. Jones Construction Co., and Chester R. Hewes, Case No. 19-CA-28,"

and for entry of a decree by the United States Court of Appeals for the Ninth Circuit, was filed in the said United States Court of Appeals for the Ninth Circuit, copy of which said petition is attached hereto.

You are also notified to appear and move upon, answer or plead to said petition within ten days from date of the service hereof, or in default of such action the said Court of Appeals for the Ninth Circuit will enter such decree as it deems just and proper in the premises.

Witness, the Honorable Fred M. Vinson, Chief Justice of the United States, this 19th day of March, in the year of our Lord one thousand, nine hundred and fifty-one.

[Seal] /s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

Return on Service of Writ attached.

Received March 23, 1951.

U. S. Marshal's Civil Docket No. 21787.

[Endorsed]: Filed March 30, 1951.

[Title of Court of Appeals and Cause.]

ORDER TO SHOW CAUSE

United States of America—ss.

The President of the United States of America

To: Guy A. Atkinson Co., a corporation, and J. A. Jones Construction Co., a corporation, d/b/a Guy F. Atkinson Co. and J. A. Jones Construction Co., Richland, Wash., and International Union of Operating Engineers, Local 370, A.F.L., Att.: Mr. William C. Robbins, 325 South Browne Street, Spokane, Washington.

Greeting:

Pursuant to the provisions of Subdivision (e) of Section 160, U.S.C.A. Title 29 (National Labor Relations Board Act, Section 10(e)), you and each of you are hereby notified that on the 19th day of March, 1951, a petition of the National Labor Relations Board for enforcement of its order entered on June 8, 1950, in a proceeding known upon the records of the said Board as

> "In the Matter of Guy F. Atkinson Co., a corporation, and J. A. Jones Construction Co., a corporation, doing business as Guy F. Atkinson Co., and J. A. Jones Construction Co., and Chester R. Hewes, Case No. 19-CA-28,"

and for entry of a decree by the United States Court of Appeals for the Ninth Circuit, was filed in the said United States Court of Appeals for the Ninth Circuit, copy of which said petition is attached hereto.

You are also notified to appear and move upon, answer or plead to said petition within ten days from date of the service hereof, or in default of such action the said Court of Appeals for the Ninth Circuit will enter such decree as it deems just and proper in the premises.

Witness, the Honorable Fred M. Vinson, Chief Justice of the United States, this 19th day of March, in the year of our Lord one thousand, nine hundred and fifty-one.

[Seal] /s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

Returns on Service of Writ attached.

[Endorsed]: Filed April 4, 1951.

[Title of Court of Appeals and Cause.]

ORDER TO SHOW CAUSE

United States of America—ss.

The President of the United States of America

To: National Association of Home Builders, Att.: Mr. William J. Tobin, 1028 Connecticut Avenue, N.W., Washington, D. C.

Greeting:

Pursuant to the provisions of Subdivision (e) of Section 160, U.S.C.A. Title 29 (National Labor Relations Board Act, Section 10(e)), you and each

of you are hereby notified that on the 19th day of March, 1951, a petition of the National Labor Relations Board for enforcement of its order entered on June 8, 1950, in a proceeding known upon the records of the said Board as

> "In the Matter of Guy F. Atkinson Co., a corporation, and J. A. Jones Construction Co., a corporation, doing business as Guy F. Atkinson Co. and J. A. Jones Construction Co., and Chester R. Hewes, Case No. 19-CA-28."

and for entry of a decree by the United States Court of Appeals for the Ninth Circuit, was filed in the said United States Court of Appeals for the Ninth Circuit, copy of which said petition is attached hereto.

You are also notified to appear and move upon, answer or plead to said petition within ten days from date of the service hereof, or in default of such action the said Court of Appeals for the Ninth Circuit will enter such decree as it deems just and proper in the premises.

Witness, the Honorable Fred M. Vinson, Chief Justice of the United States, this 19th day of March, in the year of our Lord one thousand, nine hundred and fifty-one.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

Return on Service of Writ attached.

[Endorsed]: Filed April 5, 1951.

[Title of Court of Appeals and Cause.]

ANSWER OF ENGINEERS LOCAL No. 370 TO PETITION OF THE NATIONAL LABOR RELATIONS BOARD FOR ENFORCEMENT OF ITS ORDER

To: the Honorable, the Judges of the United States Court of Appeals for the Ninth Circuit.

Comes now International Union of Operating Engineers, Local No. 370, Party to the Contract in the above-entitled proceedings, and as its answer and response to the petition for enforcement of the order of the National Labor Relations Board, admits, denies and alleges as follows:

I.

Upon information and belief, Engineers Local No. 370 admits the allegations contained in Paragraphs (1), (2), (3) and (4) of the petition.

II.

Engineers Local No. 370 denies that the Board properly found that the Respondent, by discharging Chester R. Hewes at the request of Engineers Local No. 370 violated Sections 8 (a) (3) and (1) of the amended National Labor Relations Act. Further Engineers Local No. 370 denies that the Board found properly that the Respondent rendered illegal assistance to Engineers Local No. 370 in violation of Section 8 (a) (1) of the amended Act.

Specifically and without limitation of the foregoing general denials, Engineers Local No. 370

asserts and alleges that the Board erred in finding that the Hanford Works collective bargaining agreement of August 16, 1947, which provided for closed shop form of union security, was not valid defense to the discharge of Chester R. Hewes for the following reasons:

(A) In the language of the relevant part of the proviso of Section 8 (3) of the orginal Act, an employer was authorized to enter into a "closed shop" collective bargaining agreement with a labor organization

> "if such labor organization is the representative of the employees as provided in Section 9 (a) in the appropriate bargaining unit covered by such agreement when made."

Historically and at all times during the year 1947 and until the present time, Engineers Local No. 370 had established an area-wide collective bargaining pattern through written agreements with the Associated General Contractors of America covering the entire State of Washington east of the 120th meridian and northern Idaho. The aforesaid agreements including the Associated General Contractors agreement of 1947, were approved by referendum ballot by the majority of the members of Engineers Local No. 370. The Board, therefore, erred in finding and concluding that the collective bargaining agreement of August 16, 1947, was not within the protection afforded by the priviso to Section 8 (3) of the original National Labor Relations Act.

(B) The Board's policy of non-assertion of jurisdiction over the building and construction in-

dustry at the time the collective bargaining agreement of August 16, 1947, was executed did not permit a determination of the fact that a collective bargaining unit was or was not appropriate within the purview of the priviso of Section 8 (a) (3) of the National Labor Relations Act. Therefore, although the statute provided facilities for a proper unit determination, the administrative policy of the National Labor Relations Board negated the possibility of recourse to the statutory remedy by Engineers Local No. 370 or any other labor organization or employers in the industry seeking a similar determination. The Board improperly found the collective bargaining agreement of August 16, 1947, invalid for the reason that the unit was inappropriate, while at the same time its policy denied Engineers Local No. 370 and/or Respondent the means of making a proper unit determination.

III.

Engineers Local No. 370 denies that the Board's order is valid or proper.

Further and without limitation of the foregoing, Engineers Local No. 370 alleges that the Board's order is arbitrary, capricious, contrary to law, and works inequity to Engineers Local No. 370 and Respondent as well as other labor organizations and employers in the construction industry, who may be similarly situated, for the following reasons:

(A) At the time of the execution of the collective bargaining agreement of August 16, 1947, and at the time of the discharge of Chester R. Hewes on February 19, 1948, and at the time the Order

was issued, the Board, as a matter of administrative policy, continued to refuse to assert jurisdiction over the building and construction industry. The statutory provisions of the Act authorizing the Board to hold elections were invoked by Engineers Local No. 370 during the calendar year 1948, and no action on several petitions placed before it was taken by the Board by reason of its continued refusal to assert jurisdiction over the construction industry. The Board's order, therefore, gives retroactive effect to its change in administrative policy so as to nullify rights and obligations which had matured while the original administrative policy of non-assertion of jurisdiction was still in effect. To this extent the Board's order represents a denial of due process of law in contravention of the Fifth Amendment to the Constitution of the United States, and further, does violence and is contrary to the intent of Congress.

Wherefore, Engineers Local No. 370 prays the Court to set aside the Board's order and dismiss its petition for enforcement.

Dated: May 4, 1951.

/s/ WILLIAM C. ROBBINS,
Attorney for Local No. 370, International Union of Operating Engineers.

Affidavits of Service by Mail attached.

[Endorsed]: Filed May 7, 1951.

[Title of Court of Appeals and Cause.]

ANSWER OF RESPONDENT TO PETITION AND STATEMENT OF POINTS RELIED UPON BY THE BOARD

To: the Honorable, Judges of the United States Court of Appeals for the Ninth Circuit:

Comes now Guy F. Atkinson Co. and J. A. Jones Construction Co., Respondent in the above-entitled proceedings and as its answer and response to the petition for enforcement and to the statement of points relied upon by the National Labor Relations Board, admits, denies and alleges as follows:

I.

Answering paragraph (1) of said petition, Respondent admits that it is a joint venture, composed of two corporations engaged in business in the State of Washington, within this judicial circuit. It denies that it has committed any unfair labor practices within this judicial circuit, or elsewhere.

II.

Respondent admits the allegations contained in paragraphs (2), (3) and (4) of said petition.

III.

Answering paragraphs 2 and 3 of the statement of points relied upon by the Board, Respondent denies that the Board properly found that Respondent, by discharging Chester R. Hewes, violated Section 8

(a) (3) and (1) of the National Labor Relations Act. Respondent further denies that the Board properly found that Respondent, in violation of Section 8 (a) (1) of the Act, rendered illegal assistance to Local 370, International Union of Operating Engineers, A.F.L.

In this connection, and without limiting the generality of the foregoing denials, Respondent alleges that the Board erred in finding and concluding that the closed-shop contract of August 16, 1947, between the Respondent and Local 370, International Union of Operating Engineers, A.F.L. (and various other unions affiliated with the Building and Construction Trades Department A.F.L.), was not a valid defense to the discharge of Chester R. Hewes, for the following reasons:

(a) Said finding and conclusion is not supported by substantial evidence upon the record considered as a whole.

(b) Said contract was made in good faith with the authorized and recognized collective bargaining representatives of the members of the various building and construction crafts included under the contract in the respective appropriate collective bargaining units covered by such contract when made. Therefore, said contract was within the protection of the priviso to Section 8 (3) of the orginal National Labor Relations Act.

(c) Said contract was made in good faith by a joint venture composed of members of the Associated General Contractors of America, Inc., with the authorized and recognized collective bargaining

representative of all Operating Engineers employed by members of the Associated General Contractors of America, Inc., within the Eastern Washington and Northern Idaho Territory, in which the work covered by the contract was located. The closed-shop provisions of the contract were supplemental to and in confirmation of the closed-shop provisions of an existing area agreement between the Spokane Chapter of the Associated General Contractors of America, Inc., and Local 370 of the International Union of Operating Engineers, A.F.L., dated February 28, 1947, covering all work performed by Operating Engineers within said territory. Therefore, said contract, was within the protection of the priviso to Section 8(3) of the original National Labor Relations Act.

(d) The fact that at the time when said contract was made the Board was refusing to assert jurisdiction over the construction industry and was denying to the parties the statutory facilities for determining the appropriateness of the units involved makes erroneous and improper a finding that the contract was invalid because the units covered were inappropriate.

IV.

Answering paragraph 4 of the statement of points relied upon by the Board, Respondent denies that the Board's order is either valid or proper.

In this connection, and without limiting the generality of the foregoing denial, Respondent alleges that said order is arbitrary, capricious and contrary to law for the following reasons:

(a) Said order attempts to give retroactive application to a change in administrative policy. In the exericse of its discretionary authority so to do, the Board elected not to assert jurisdiction over the construction industry under the original National Labor Relations Act. The execution of the contract of August 16, 1947, and the discharge of Chester R. Hewes on February 19, 1948, took place while this original administrative policy was still in effect. The retroactive application of the Board's change in this policy of abstention in such a way as to nullify rights acquired and obligations assumed in reliance upon the original policy is contrary to the intent of Congress and is a denial of due process of law in contravention of the Fifth Amendment to the Constitution of the United States.

(b) Said order was issued at a time when the Board was continuing to refuse to entertain petitions for certification and union-shop elections in the construction industry. The enforcement of the unfair labor practice provisions of the National Labor Relations Act against employers and unions who have been denied the benefit of the election provisions of the Act is contrary to the intent of Congress, and a denial of due process of law in contravention of the Fifth Amendment to the Constitution of the United States.

(c) For the reason alleged in subparagraphs (a) and (b) of this paragraph IV, the Board was and is estopped to order and direct Respondent to take the action specified in such order.

(d) For the reasons alleged in subparagraphs (a) and (b) of this paragraph IV, and for the further reason that the Board found that Respondent had acted in good faith in discharging Chester R. Hewes, such portion of said order as directs Respondent to pay back wages to said Chester R. Hewes is invalid and improper.

(e) For the reasons alleged in subparagraphs (a), (b) and (d) of this paragraph IV, and for the further reason that Chester R. Hewes would have been rehired upon application to Respondent after the closed-shop contract of August 16, 1947, was superseded by an open-shop contract effective August 10, 1948, such portion of said order as directs Respondent to pay back wages to said Chester R. Hewes for any period after August 10, 1948, is invalid and improper.

V.

Answering the statement of the Board, dated March 22, 1951, with respect to its petition, Respondent alleges that in proceedings before the Board in Case No. 19-UA-2259, the International Union of Operating Engineers, Local 370, A.F.L., was authorized by the employees in the bargaining unit certified in Case No. 19-RC-646, to execute a union-shop agreement with Respondent covering such unit. Therefore, the provisions of paragraph 1 (c) of the Board's order are inappropriate insofar as such order applies to the employees covered by said certification.

Wherefore, Respondent prays that the Court set

aside the Board's order and dismiss its petition for enforcement.

Dated: May 7, 1951.

GARDINER JOHNSON,
THOMAS E. STANTON, JR.

By /s/ THOMAS E. STANTON, JR.,
Attorneys for Respondent, Guy F. Atkinson Co. and J. A. Jones Construction Co.

Affidivats of Service by Mail attached.

[Endorsed]: Filed May 7, 1951.